

**IN THE SUPREME COURT
OF THE STATE OF OHIO**

Case No. 06-1304

**PIONEER NATIONAL LATEX, Et Al.,
Appellants-Defendants**

-vs-

**MARLENE LEININGER,
Appellee-Plaintiff.**

APPELLEE'S MERIT BRIEF

On appeal from the May 26, 2006 Decision of the Ohio Fifth District Court of Appeals
for Ashland County in Case No. 05-COA-048

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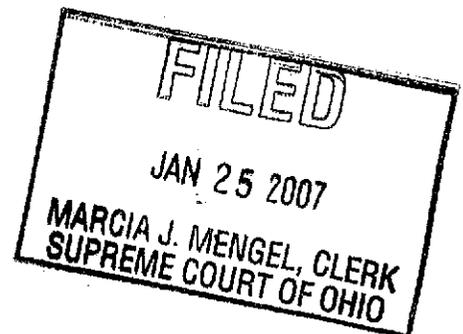


TABLE OF CONTENTS

	<u>Page</u>
<u>Table of Authorities Cited</u>	iii
<u>Statement of the Facts</u>	1
The Procedural Record.....	1
The Evidence.....	2
Treatment of Summary Judgment Motion Practice Below.....	6
 <u>Argument in Opposition to the Appellant’s Case on Appeal and in Support of Affirmance of the Ohio Fifth District Court of Appeals</u>	
 I. <u>Appellant’s Proposition of Law No. 1: A plaintiff cannot state a separate cause of action for wrongful discharge in violation of public policy based upon the policy against age discrimination in employment embodied in Ohio Revised Code Chapter 4112, as Chapter 4112 provides adequate legal remedies</u>	
<u>Appellee’s Response to Proposition of Law No. 1</u>	9
<u>Appellee’s Reply to Appellant’s Argument Part A</u>	11
<u>Appellee’s Reply to Appellant’s Argument Part B</u>	15
<u>Appellee’s Reply to Appellant’s Argument Part C</u>	21
<u>Appellee’s Reply to Appellant’s Argument Part D</u>	27
<u>Appellee’s Reply to Appellant’s Argument Part E</u>	30
<u>Appellee’s Reply to Appellant’s Argument Part F</u>	31
 II. <u>Appellant’s Proposition of Law No. 2: A plaintiff cannot state a cause of action for wrongful discharge in violation of public policy embodied in a statute unless the plaintiff has strictly complied with the procedural requirements of the underlying statute, including the applicable statute of limitations</u>	
<u>Appellee’s Response to the Appellant’s Proposition of Law No. 2</u>	31

Conclusion and Prayer.....36

Certificate of Service.....38

Appendix Page

Appendix.....1

1. Ashland County Ct. Com. Pls. Opinion and Order of October 17, 2005.....	2
2. Opinion of the Ohio Fifth District Court of Appeals of May 26, 2006.....	23
3. Unreported case, <i>Leonardi v. Lawrence Indust., Inc.</i> , No. 72313, 1997 Ohio App. LEXIS 4014 (Ohio Ct. App. 8 th Dist. Sept 4, 1997).....	36
4. Ohio R.C. 1.12.....	43
5. Ohio R.C. 1.51.....	45
6. Ohio R.C. 4112.02 <i>et seq.</i>	47
7. Ohio R.C. 4112.14.....	58
8. Ohio R.C. 4112.99.....	60
9. 15 USC 12.....	62
10. 29 USC 621.....	65
11. 29 USC 623.....	67
12. 29 USC Section 2601 <i>et seq.</i>	76
13. 29 USC 2611 (4).....	80
14. 42 USC 2000 <i>e et seq.</i>	83

TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
<i>Adair v. United States</i> , 208 U.S. 161 (1908).....	15
<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974).....	23
<i>Balyint v. Arkansas Best Freight Sys.</i> , 18 Ohio St. 3d 126 (1985).....	17
<i>Bascom v. Shillito</i> , 37 Ohio St. 431 (1882).....	12
<i>Bellian v. Bicron Corp.</i> 69 Ohio St.3d 517 (1994).....	24
<i>Berge v. Columbus Community Cable Access</i> , 136 Ohio App. 3d 281(1999).....	31
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954).....	12
<i>Celeste v. Wiseco Piston</i> , 151 Ohio App. 3d 554 (2003).....	32,35
<i>Chandler v. Empire Chem., Inc.</i> 99 Ohio App. 3d 396 (1994).....	29
<i>Collins v. Rizkana</i> , 73 Ohio St. 3 rd 65, 74 (1995).....	10,16,19,33,34
<i>Contreras v. Ferro Corp.</i> , 73 Ohio St. 3d 65 (1995).....	36
<i>Coolidge v. Riverdale Local School Dist</i> , 100 Ohio St.3d 141 (2003).....	14
<i>Cosgrove v. Williamsburg of Cincinnati Management Company</i> , 70 Ohio St. 3d 281(1994).....	24
<i>Elek v. Huntington Natl. Bank</i> , 60 Ohio St. 3d 135 (1991).....	24
<i>Fawcet v. G.C. Murphy & Co.</i> , 46 Ohio St. 2d 245 (1976).....	24
<i>Ferraro v. B.F. Goodrich Co.</i> , 149 Ohio App. 3d 301 (2002).....	17
<i>Fletcher v. Coney Island, Inc.</i> , 165 Ohio St. 150 (1956).....	17
<i>Gessner v. City of Union</i> , 159 Ohio App. 3d 43 (2004).....	30
<i>Greeley v. Miami Valley Maintenance Contrs., Inc.</i> , 49 Ohio St. 3d 228	

(1990).....	13,18,24,34
<i>Henkel v. Educ. Research Council</i> , 45 Ohio St. 2d 249 (1976).....	12
<i>Helmick v. Cincinnati Word Processing, Inc.</i> , 45 Ohio St. 3d 131(1989).....	16,18
<i>Hoops v. United Telephone Company of Ohio</i> , 50 Ohio St. 3d 97 (1990).....	25
<i>James v. Delphi Automotive Systems</i> , 10 th Dist. No. 04 AP-215, 2004 Ohio 5493.....	30
<i>Johnson v. Railway Express Agency, Inc.</i> , 421 U.S. 454 (1975).....	23
<i>Kanieski v. Sears, Roebuck & Co.</i> , 2003 Ohio 421 (Cuyahoga App. No. 80833).....	30
<i>Kulch v. Structural Fibers, Inc.</i> , 78 Ohio St. 3d 134 (1997).....	9,13,17,20,34,35
<i>Leonardi v. Lawrence Indust., Inc.</i> , No. 72313, 1997 Ohio App. LEXIS 4014 (Ohio Ct. App. 8 th Dist. Sept 4, 1997).....	29,30
<i>Lewis v. Fairview Hospital</i> , 156 Ohio App. 387 (2004).....	28
<i>Livingston v. Hillside Rehabilitation Hospital</i> , 79 Ohio St. 3d 249 (1997).....	6,7,8,9,20,27,29,34,35
<i>Lakeland Employment Group of Akron v. Columber</i> , 101 Ohio St. 3d 242 (2004).....	14
<i>Lochner v. New York</i> , 198 U.S. 45 (1905).....	12
<i>Mauzy v. Kelly Services, Inc.</i> 75 Ohio St. 3d 578 (1996).....	22
<i>Mers v. Dispatch Printing Co.</i> , 19 Ohio St. 3d 100 (1985).....	11
<i>NLRB v. Jones & Laughlin Steel</i> , 301 U.S. 1 (1937).....	15
<i>Oker v. Ameritech Corporation</i> , 89 Ohio St. 3d 223 (2000).....	33
<i>Painter v. Graley</i> , 70 Ohio St. 3d 377 (1994).....	13,19
<i>Payne v. Western & Atlantic Railroad Co.</i> , 81 Tenn. 507 (Sept. Term 1884).....	12

<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896).....	12
<i>Pytlinski v. Brocar Products</i> , 94 Ohio St. 3d 77 (2002).....	9,34,35,36
<i>Rice v. Certainteed Corporation</i> , 84 Ohio St. 3d 417 (1999).....	25
<i>Stephens v. Kettering Adventist Healthcare</i> , 182 Fed. Appx. 418 (CA6, 2006).....	30
<i>Weller v. Titanium Metals Corp.</i> , 102 Ohio St. 3d 8 (2004).....	34
<i>Wiles v. Medina Auto Parts</i> , 96 Ohio St. 3d 240 (2004).....	7,8,21,22,23,34

Statutes, Codes, Rules and Regulations

Page

Ohio R.C. 1.12.....	25
Ohio R.C. 1.51.....	25
Ohio R.C. 4101.17.....	24
Ohio R.C. 4112.02.....	7,10,16,21,25,26,31,32,34
Ohio R.C. 4112.14.....	7,10,24,35
Ohio R.C. 4112.02 (I).....	28
Ohio R.C. 4112.99.....	7,25
15 USC 12.....	12
29 USC 621.....	7
29 USC 623.....	21
29 USC Section 2601.....	21
29 USC 2601 (b)(1).....	22
29 USC 2611 (4).....	23
42 USC 2000 e.....	21,28

Other Authority

Page

Horace C. Wood, *Master and Servant* Section 134 (1877).....12

Rothstein, Craver, Schroeder, Shoben and Vandervelde, *Employment Law*,
Section 1.4 (West 1994).....12

Uchitelle, *The Disposable American, Layoffs and Their Consequences*,
(2006 Knopf Publishing).....12

STATEMENT OF THE FACTS

The Procedural Record

The instant case *Marlene Leininger v. Pioneer National Latex, Jerry Meyer, and Melissa McCormick* was filed on April 29, 2005. (Complaint in Case No. 05 CIV 143; Appellant's supplement page 15). This case was originally pending in front of Ashland County Common Pleas Judge Runyan as Ashland County Case No. 03 CIV 099 which was then voluntarily dismissed and later refiled as Case No. 04 CIV 075 to cure discovery and other logistical problems. However, after Judge Runyan was not reelected in the Fall 2004 judicial election and Judge Woodward took his place in 2005, Case No. 04 CIV 075 was dismissed by the Court after the Defendant's motion for summary judgment was earlier overruled on November 24, 2004. The reason Case No. 04 CIV 075 was dismissed by Judge Woodward post summary judgment was because the Plaintiff did not appear at a final pre-trial set for April 4, 2005. The undersigned's excuse for this was there was confusion over the date of this event per Judge Runyan's communications with counsel during a November 2004 telephone pre-trial that resulted in an order continuing the original trial date set to go forward during his term on November 16, 2004. The Woodward Court did not hold a required Civil Rule 41 (B) notice hearing before dismissing 04 CIV 075 and as such the dismissal of that case was without prejudice. The instant case, Case No. 05 CIV 143 was then filed as noted on 29 April 05. The Defendant-Appellee then refiled its motion for summary judgment pursuant to leave given, over the undersigned's objection, in a telephone case management conference had with the Court on July 20, 2005. The new motion contained identical arguments found in the original overruled motion for summary judgment and motion for reconsideration

filed in 04 CIV 075. After briefing was had, the Court granted the Defendant-Appellee's motion for summary judgment and dismissed the case on October 14, 2005. The Court then amended its order dismissing the case and filed it for record on October 17, 2005 after it was called to her attention that the Court erroneously accused the undersigned in very harsh tones of not complying with Judge Runyan's order to submit a dispositive order to the Court for signature pertaining to his decision to overrule the Defendant's motion for summary judgment. (Appendix 1, Ashland Cty. Ct. Com. Pls. Opinion and Order at 2-3, Appx. Pg. 3-4). Following the dismissal, the Plaintiff-Appellee appealed this adverse judgment to the Ohio Fifth District Court of Appeals (Ashland County) and on May 26, 2006 the Appellate Court reversed the Trial Court's summary judgment order. (Appendix 2, Ohio 5th District Opinion and Journal Entry of May 26, 2006). Seeking reversal of the Fifth District's Order; the Appellant-Defendant then filed the instant appeal to this Ohio Supreme Court on July 7, 2006 and this Court agreed to hear this case upon discretionary review on October 18, 2006. (Appellant's Brief Appendix at pgs. 1 and 2).

The Evidence

At all times relevant in this case the Plaintiff-Appellee Marlene Leininger was a sixty year old human resources administrator who worked for Defendant-Appellant Pioneer National Latex, a manufacturer of toy balloons. (Complaint at par. 1; Plaintiff's affidavit in Opp. to S/J (summary judgment brief in opposition) at 4). Pioneer came into existence in December of 1999 when the company purchased National Latex and re-named it. (Meyer depo at 11). As part of the purchase, Ms. Leininger and the other National Latex employees were afforded an opportunity to continue to work for the new

company in previous positions. (*Id.* at 14). It is undisputed Ms. Leininger had worked for Pioneer and its previous owner for over 19 years. Defendant-Appellant Jerry Meyer, Appellant's general manager and Appellant's supervisor, agreed Ms. Leininger was "certainly" qualified for employment. (Meyer depo at 22). In spite of this, Ms. Leininger was terminated from her employment on May 25, 2001 for the pretextual excuse of poor employment performance, said excuse which was later abandoned and company "downsizing" was then substituted in its place. In fact, the record shows the Appellant was replaced as H.R. administrator by 21 year old Defendant-Appellee Melissa McCormic (aka Wagner) after Ms. Leininger trained her to perform her job duties, at the insistence of a manager named Rodney Lowe, at the same time the Appellant claims it was downsizing the company thereby negating the excuse as truthful. (Plaintiff's Opp. S/J Exhibit 1, 2; McCormic depo at 3; 23-33; 34-35; Complaint at par. 4). Indeed, the record shows manager Lowe lobbying Appellant Meyer and his other higher management on May 13, 2001, or within 12 days of the Plaintiffs' termination to "let Marlene go and put Melissa (McCormic) in her position...replace the HR position [i.e. Marlene] with Melissa." (Plaint. S/J Opp. Exhibit 2). Plaintiff's Summary judgment Opposition Exhibit 2 also has Mr. Lowe advising his boss Dan Flynn to fire Plaintiff *and replace her with McCormic* and use the excuse of poor performance to justify the termination. Mr. Lowe coveted the younger more attractive Ms. McCormic, claimed McCormic was a "bright and upcoming individual", and to remove and replace Ms. Leininger manufactured a false record showing she was a terrible employee. (Lowe depo at 61-68; 70; 79; S/J Opp. Exhibit 2). Lowe accomplished this by having Ms. McCormic make phoned-in or e-mailed reports to him about any negative job performance she felt

she could pin on Ms. Leininger, and then Mr. Lowe used the information to make complaints to Mr. Meyer hoping to get the Appellee fired. (Lowe depo at 67-68; 69-70; McCormic depo at 26-27; 35). Accordingly, when McCormic was pressed for examples of Appellee's alleged poor work performance given by her to Lowe to justify the Appellee's discharge; Ms. McCormic could not identify anything except that (1) she did not like the Plaintiff's handling of the storage of medical files, (2) her not learning to operate a H.R. computer software program fast enough, and (3) the fact that she resented Plaintiff giving her work to do. (McCormick depo at 35; 37; 44). From McCormick depo at 35: "Q. ... So far I've got, you've said something about filings, something about not taking the time to learn computer programs, and other complaints where you talked to a manager, and said, you know, Marlene is not doing this right? A. The work load was pushed - I feel the workload was pushed on me a lot." McCormick claimed "she had a problem" with "helping the boss" and felt Plaintiff "was not up to (McCormick's) standards" in spite of the fact McCormick had been on the job as an HR assistant less than two years and Plaintiff had been doing her job for decades and was McCormick's supervisor. (McCormick depo at 34; 43; 47; 49-50). McCormick agreed when she was complaining about Plaintiff's performance (to Manager Lowe), she was really "complaining about something she (McCormic) was hired to do" which we can infer is code for that she wanted Leininger's job and did not want to do her own and thus had a motive to render assistance to Mr. Lowe. (*Id.* at 47). And when the fact of collusion between McCormick and Lowe became obvious; Mr. Lowe tried to cover himself by claiming he did not want to fire the Plaintiff for poor performance. (Lowe depo at 55; 70). And after all of this we have Ms. McCormick testifying: Q. Did you think there was

ever a good reason to terminate her (Plaintiff), while she worked there (at Pioneer? A. No.” (McCormick depo at 34). Moreover, when asked whether Appellee Leininger was fired because she was a “bad worker” during deposition cross examination, Appellant McCormick responded with an unqualified “no.” (McCormick depo at 23-24). When asked what was “the straw that broke the camel’s back” that made Appellee unacceptable for continued Pioneer employment, Manager Lowe evaded the question saying “I don’t look at employees like that.” (Lowe depo at 30). Moreover, after Ms. Leininger was terminated, the Defendant-Appellant’s management gave the Appellee a glowing recommendation advising all of her of being one of the best employees to ever work at Pioneer. (Plaintiff’s S/J Opposition Exhibits 3 and 4).

So much for the excuse of poor employment performance being credible.

And now the smoking gun: Eye witness Tanya Rishel testified Melissa McCormick told her that she knew Ms. Leininger was terminated because Pioneer “wanted to get younger people” and Plaintiff “was too old to continue working there” (Plaintiff’s S/J opposition exhibit Rishel Aff. At Par. 3; Plaintiff’s S/J opp. Exhibits 3 and 4). The Appellee submits that this is direct proof of age discrimination buttressing a circumstantial evidence case.

Now seeing in the face of these revelations it could not succeed in proving the Appellee was justifiably terminated for performance reasons, Pioneer proffered a different additional excuse for termination: Company downsizing. (Def. M. S/J at 14-15; 23-25). Defendant-Appellant Meyer advised that the exact reason for Leininger’s termination was “cut back, reduction of the staff.” (Meyer depo at 14). In fact, Meyer indicated he had no grounds independent of downsizing to justify Appellee’s termination.

(Meyer depo at 22). However, the downsizing excuse does not explain why the highly qualified Appellee was terminated and replaced with someone decades younger who was not let go and whom Appellee trained, and who was in effect recently hired, nor defeat the direct evidence of age discrimination; and it can therefore be rejected out of hand as a pretext. The Appellee submits that the foregoing facts make out a classic *prima facie* age discrimination case under a variety of legal theories.

Treatment of Summary Judgment Motion Practice Below

Accordingly, as there was a the contradiction between the ever changing excuses proffered for the Appellant's termination, and that between the excuses offered and the direct and circumstantial evidence, Judge Runyan denied the Defendant-Appellee's Rule 56 motion in Case No. 04 CIV 075.

As noted the case was dismissed and refiled, and this brings us to the fact that after Judge Runyan was replaced by Judge Woodward, the Trial Court dismissed this case on the Appellant's third motion for summary judgment for the reason that "as a matter of law a cause of action for the tort of wrongful discharge in violation of Ohio public policy based upon age discrimination does not exist under Ohio law." (Ashland Cty. Com. Pls. Order of 10-17-05 at 16, Appendix 1 at pg. 17). In arriving at its decision, the Court refused to apply the law of *Livingston v. Hillside Rehabilitation Hospital*, 79 Ohio St. 3d 249 (1997) which held a cause of action for wrongful termination in violation of Ohio public policy for discrimination based upon age was an available remedy for victims such as Plaintiff-Appellee Leininger. (*Id.* at 14; Appx. at 15). In refusing to follow the settled law, the Trial Court tried to distinguish *Livingston* by claiming Ms. Leininger has not alleged her termination was in violation of Ohio R.C. 4112.14 or any

other statute. *Id.* The Court held: “While *Livingston* was limited to whether or not a public policy tort based on 4101.17 is viable, the question in this case is whether or not the Plaintiff can file the public policy tort action given all of the statutory remedies available at law, not just those in ORC Section 4112.14. Accordingly, while *Livingston* is precedent, it is not dispositive of the issues presented in this case in the Court’s opinion.” *Id.* The Court then went on to refuse consideration of the Plaintiff’s cited precedents showing a number of Ohio Courts recognize a cause of action for wrongful termination in violation of Ohio public policy based upon age discrimination and argued that Ohio R.C. 4112.02 (N), 4112.14, 4112.99 and the ADEA, 29 USC 621 provide adequate remedies for age discrimination claims. *Id.* at 14-15. (Appx. 1 at pg. 15-16). The Court claimed that the Appellant has not identified any remedy which is available in a wrongful discharge tort which is not available under statute, but claimed to acknowledge the short statute of limitations [180 days] that accompany all of the listed remedies, and then blamed the Plaintiff-Appellee for not taking advantage of the statutes in a timely fashion. *Id.* at 15-16. (Appx. 1 at pg. 16-17). The Court apparently did not notice that Appellant Pioneer did not specifically discuss the adequacy of these particular remedies in its motion for summary judgment and that is why it was not addressed by the Appellee in its motion for summary judgment opposition brief. In fact the Trial Court Court advised “(t)he only potential distinguishing factor between the statutory remedy in ORC Section 4101.17 and the tort remedy with regard to age discrimination was the existence of a right to a jury trial in the tort action.” *Id.* at 11. (Appx. 1 at pg. 12). Ultimately, the Trial Court offered dictum in *Wiles v. Medina Auto Parts*, 96 Ohio St. 3d 240 (2002), a federal Family and Medical Leave Act case, argued by the undersigned

counsel to this Ohio Supreme Court, finding “the Plaintiff has not established the jeopardy element of the tort of wrongful discharge based upon age discrimination because the statutory remedies available do adequately protect the public policy against age discrimination.” *Id.* at 16. (Appx. 1 at pg. 17). The Trial Court further acknowledged that in making its adverse decision it was refusing to apply a number of post *Wiles* decisions finding that a claim for wrongful discharge in violation of Ohio public policy based upon age discrimination may currently be maintained and claimed they were not binding precedent on her Court. *Id.* at 13. (Appx. 1 at pg. 14).

Finding this state of affairs unacceptable, the Appellee appealed to the Fifth District Court of Appeals (Ashland County) who without making a factual analysis of the merits of parties dispute as like the Trial Court’s similar treatment of this case below reversed Judge Woodward’s decision and reinstated this case for trial opining, *inter alia*: “The *Livingston* case has been interpreted as permitting claims for wrongful discharge in violation of public policy based upon age discrimination.” (Appendix 2, 5th Dist. Opinion and Order at 7, Appx. Pg. 29). The Appellate Court reviewed the legal analysis in *Wiles v. Medina Auto Parts*, 96 Ohio St. 3d 240 (2004) regarding the viability of a public policy tort claim based upon a specific violation of the federal Family and Medical Leave Act and found that case did not overrule *Livingston* and was not controlling in the case *sub judice*. (*Id.* at 7-8; Appx. pg. 29-30). “Based upon the foregoing, we find that the trial court erred in holding that a cause of action for wrongful discharge in violation of public policy based upon age discrimination does not exist under Ohio law.” *Id.* With respect to the Appellant Pioneer’s argument that the Appellee was bound by a 180 day statute of limitations found in Ohio R.C. 4112.02 (A) relating to age discrimination

claims, and that her instant case was untimely filed, the Appellate Court disagreed citing, *inter alia*, *Pytlinski v. Brocar Products*, 94 Ohio St. 3d 77 (2002) which established there is a four year statute of limitations for public policy tort claims brought independent of statutory causes of action. (*Id.* at 9-10; Appx. pg.31-32). “For the foregoing reasons, appellant’s two assignments of error are sustained.” *Id.*

The case is now before this Honorable Court pursuant to the allowance of the Appellant Pioneer National Latex filing a discretionary appeal on October 18, 2006. The Appellee urges this Court to deny the appeal and affirm the decision of the Ohio Fifth District Court of Appeals for reasons discussed in the following arguments.

ARGUMENT IN OPPOSITION TO THE APPELLANT’S CASE ON APPEAL AND IN
SUPPORT OF AFFIRMANCE OF THE OHIO FIFTH DISTRICT COURT OF
APPEALS

I. Appellant’s Proposition of Law No. 1: A plaintiff cannot state a separate cause of action for wrongful discharge in violation of public policy based upon the policy against age discrimination in employment embodied in Ohio Revised Code Chapter 4112, as Chapter 4112 provides adequate legal remedies.

Appellee’s response to proposition of Law No. 1:

In a 5-2 decision joined by the current Chief Justice, this Court held the exact opposite of Appellant’s Proposition of Law No. 1 is true in *Livingston v. Hillside Rehabilitation Hospital*, 79 Ohio St. 3d 249 (1997) where it was established that an “at-will employee discharged allegedly on the basis of her age is entitled to maintain common-law tort action against employer for wrongful discharge in violation of public policy.” (*Id.* at syllabus, opinion citing *Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d 134 (1997)). Accordingly, the Fifth District Court of Appeals correctly found below “the

Livingston case has been interpreted as permitting claims for wrongful discharge in violation of public policy based upon age discrimination.” (Appendix 2, 5th Dist. Opinion and Order at 7, Appx. Pg. 29). In fact, in *Collins v. Rizkana*, 73 Ohio St. 3rd 65, 74 (1995) which proceeded *Livingston*, this Court reversed an Ohio 5th District Court of Appeals decision dismissing a sex discrimination claim brought as an independent public policy wrongful discharge tort claim using R.C. 4112.02 as a public policy basis finding “appellant could pursue her sexual harassment/discrimination claim irrespective of the remedies provided by Ohio Rev. Code Ann. § 4112.” Therefore, there is no basis to argue, especially after the Appellant has submitted no proof the Ohio public has not benefited from a decade of jurisprudence built upon the foundation of *Livingston*, that the public policy tort age discrimination claim in this case should be treated differently than sex and other kinds of illegal discrimination claims underpinned by Ohio R.C. 4112 *et seq.* or any other statute. On the whole, an Ohio R.C. 4112.14 age discrimination claim is won by a finding of age discrimination. But a wrongful-discharge tort in violation of the public policy against age discrimination is won by a finding the public policy of Ohio is jeopardized by an employer’s discriminatory conduct. Public policy is broader and encompasses many sources of law and interests to be vindicated including a deterrence interest not embodied in the limited remedy R.C. 4112.14, for example, thereby making the availability of the broader tort cause of action appropriate. And in spite of the verbosity of the Appellant’s brief on appeal; this appeal is at its heart about a Kansas company doing business in Ohio, Appellant Pioneer National Latex, seeking to escape Ohio justice for unlawful discrimination against its vulnerable age discrimination victim, Appellee Marlene Leininger. This appeal is not about an employer being treated unfairly

by the common law of this Court. In the light of this and the following opposition arguments, this appeal should be dismissed.

Appellee's Reply to Appellant's Argument Part A:

In its first argument, the Appellant claims: "This Court Should Not Permit Further Erosion Of The Employment-At-Will Doctrine By Expanding The Public Policy Exception To Recognize Claims Premised Upon Statutes That Both Create a Substantive Right and Provide a Remedial Scheme Sufficient to Redress Violations of that Right."

(Appellant's Brief at 7)

The Appellant's argument does not demonstrate there is evidence of a threat to the at-will doctrine by Marlene Leininger's public policy tort claim, nor a threat to any legislative prerogative, nor the stability of Ohio business, nor that the case at bar is based solely upon a statute that created an exclusive right and remedy. At the outset, the common law at-will doctrine cited in *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 103 (1985) that decrees "a general or indefinite hiring is terminable at the will of either employee or the employer" for "any reason or no reason" "except a reason contrary to law" is hardly at risk of being "eroded" by the Appellant or the law in the *Livingston* case. The Appellant's argument that the at-will rule has its origins in English common law is incorrect. (Appellant's Brief at 7). The at-will rule (a.k.a. "Wood's rule") was invented by American legal writer Horace C. Wood in 1877 in a treatise he authored, later followed by the courts, and was created during a time when America was in reconstruction after the civil war, was an expanding frontier nation seeking to "win the west", large scale corporations with lopsided concentrations of wealth did not exist, there was no such thing as scientific management, racial apartheid was institutionalized as a fundamental right by the Supreme Court, employees were relatively unskilled, job turn

over rates were high due to large immigrant populations displacing each other, and in fact prior to 1914 employees were seen as if their labor was a mere commodity or article of commerce and not the product of persons with civil rights. See, Horace C. Wood, *Master and Servant* Section 134 at pages 272-273 (1877); *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by*, *Brown v. Board of Education*, 347 U.S. 483 (1954); *Lochner v. New York*, 198 U.S. 45 (1905); Clayton Act of 1914, 15 USC 12, Section 17 (“The labor of a human being is not a commodity or article of commerce.”); Uchitelle, *The Disposable American, Layoffs and Their Consequences*, (2006) Chapter 2, Knopf Publishing. Indeed, as this Court noted in *Collins*, the “at will” rule “developed during a time when the rights of an employee, along with other family members, were considered to be not his own but those of his or her paterfamilias.” 73 Ohio St. 3d at 68-69 (citations omitted). The first case on record to cite the rule was *Payne v. Western & Atlantic Railroad Co.*, 81 Tenn. 507, 519-520 (Sept. Term 1884) where the Court held following “Wood’s rule” “All may dismiss their employees at will, be they many or few, for good cause, for no cause, or even a cause morally wrong, without being thereby guilty of legal wrong.” Wood’s rule was never used in England and is a deviation from the common law rule which presumed a man is employed for a tenure of one year (the length of an agricultural season) when he is hired without making a contractual agreement otherwise. This Court’s own cases tacitly suggest the one year tenure rule existed in Ohio prior to the 1800’s and then was replaced by Wood’s rule. See, *Bascom v. Shillito*, 37 Ohio St. 431 (1882); *Henkel v. Educ. Research Council*, 45 Ohio St. 2d 249 (1976); Rothstein, Craver, Schroeder, Shoben and Vandervelde, *Employment Law*, Section 1.4 (West 1994). In light of this, we need not cite authority to establish that that society’s expectations for

employers and the rights of employees have changed over the last 120 years. The undersigned submits that in 2007 this Court could hardly hold that an Ohio employer could lawfully fire the Appellee for “a cause morally wrong, without being thereby guilty of legal wrong.” And given the rule had not been changed significantly in the Courts to keep up with society’s just demands for fairness and justice in the workplace as late as the 1950’s, its harsh application eventually had to be fine tuned to serve the interest of changing public labor policy. As this Court held in *Collins* discussing the harshness of the rule: “The surrender of basic liberties during working hours is now seen to present a distinct threat to public policy carefully considered and adopted by society as a whole. As a result...a proper balance must be maintained among the employer’s interest in operating a business efficiently and profitably, the employees interest in earning a livelihood, and societies interest in seeing its public policies carried out.” 73 Ohio St. 3d at 68-69 (citations omitted). This Court also held in *Mers*: “This is not to say that employment-at-will agreements are without any defined limits. For example, Congress and the General Assembly have enacted laws forbidding retaliatory discharge for filing workers’ compensation claims and for union activity, and discriminatory filings based on race, sex, age or physical handicap.” 19 Ohio St. 3d at 103. This Court has also evolved the common law of employment relations to keep up with the changing expectations of a just society as well. See, *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St. 3d 228 (1990); *Painter v. Graley*, 70 Ohio St. 3d 377 (1994); *Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d 134, 155, 161 (1997)(“The employment at will doctrine was judicially created and it may be judicially abolished”). In fact, recently this Court adapted an exception to the at-will rule commonly found in public policy tort wrongful

termination cases and determined collective bargaining unit employees also could not be lawfully terminated for reasons that are repugnant to public policies expressed in statutes, such as that found in the worker's compensation system. *See, Coolidge v. Riverdale Local School Dist*, 100 Ohio St.3d 141, 144, 150 (2003). Accordingly, in light of the above; the claim that the Appellee's case erodes the 120 year old at-will doctrine and that the "employment at will rule benefits both employers and employees by delineating the rights and responsibilities of each party" is simply unfounded if not absurd. (Appellant's Brief at 9). The at-will doctrine by design protects Ohio employees from nothing, gives them nothing, and provides no certainty to them about anything. If not restrained by this Court's common law, in hard economic times employers will feel free to discriminate against older persons to cut costs for example; and when economic times are good, employers will evade the doctrine by forcing employees to sign non-compete agreements that prevent them from leaving the job for greener pastures to work for competitive employers out of fear of being sued while insisting they are "at-will" employees at the same time. *Lakeland Employment Group of Akron v. Columber*, 101 Ohio St. 3d 242, 247-248 (2004). Appellants' argument that "this case offers the Court an opportunity to set forth a bright line rule that affirms the primacy of the employment at will doctrine in Ohio and resolves the current confusion among lower courts regarding the proper limits of the public policy exception" (*Id.* at 10) is in actuality asking this Court to reward some lower Courts for not following *Livingston* and not protecting discrimination victims as their duty requires. On the whole, Appellee's common law tort case rights a moral and legal wrong whereas the frontier era at-will doctrine championed by the Appellant seeks to unjustly immunize discrimination based upon age, --something this Court should never

tolerate in a modern civilized society. It is also interesting to note that Appellant's cited case *Adair v. United States*, 208 U.S. 161 (1908) and its quote from that case on page 8 of Appellant's brief championing limitations on government regulation of the workplace omits an admonition from the high court in the same sentence which states "...the rights and liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to reasonable restraints as the common good or the general welfare may require..." 208 U.S. at 174. The Appellant also overlooks the fact *Adair* was in effect overruled by *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937) which upheld the constitutionality of the National Labor Relations or "Wagner Act", 29 USC 151-169 which created the National Labor Relations Board and afforded collective bargaining rights to employees in spite of the employers right to discharge at will. In short, the at-will doctrine is not a fundamental right held by employers, it is a court created presumption and can be made subject to exceptions as justice requires, and in the absence of any proof of harm, this Court should not change the law of the *Livingston* case. As this Court held in *Mers*: "The need for certainty and continuity in the law requires us to stand by precedent and not disturb a settled point unless extraordinary circumstances require it." 19 Ohio St. 3d at 103.

Appellee's Reply to Appellant's Argument Part B:

In Part B of its brief, the Appellant argues: "This Court Should Not Recognize a Private Cause of Action, Sounding in Tort, for Wrongful Discharge in Violation of Public Policy Premised Upon Ohio Revised Code Chapter 4112." (Appellant's brief at 10).

The Appellant's argument here is based upon the theory that this Court should not "substitute its own opinion for that of the General Assembly in discerning the

appropriate means for individuals to vindicate legislatively created rights.” (Appellant’s Brief at 10). The flaw in the Appellant’s reasoning is that a common law public policy against age discrimination exists independently and in advance of the enactment of Ohio R.C. 4112.02 and the Courts have not agreed to subordinate themselves to the legislature by abandoning their right to create and enforce common law tort remedies. Does the Appellant seriously argue that it was the policy of this State to encourage employers to discriminate based upon an employee’s age prior to the enactment of Ohio R.C. 4112.02? The undersigned submits that an employee could sue an employer under a common law intentional infliction of emotional distress tort, or breach of contract theory for intentional age discrimination prior to the enactment of R.C. 4112.02 *et seq.* but those remedies would be limited to few plaintiffs based upon whether an employer’s conduct was “outrageous” or outside of the at-will doctrine by agreement of the parties thus leaving many employees helpless to redress an employer’s invidious discrimination. Moreover, Ohio R.C. 4112.02 applies only to those employers with four or more employees, leaving small firm employees in a position where they cannot employ R.C. 4112.02 to solve any discrimination problems in any event and thus without the public policy tort cause of action would have no remedy for discrimination at all. *Collins*, 73 Ohio St. 3d at 74; 29 USC 2611 (4). Accordingly, this Court has wisely created the public policy tort exception to the at-will doctrine expanding the scope of available discrimination remedies to injured and deserving employees as R.C. 4112.02 actually encourages. For example, this Court previously held in *Helmick v. Cincinnati Word Processing, Inc.*, 45 Ohio St. 3d 131, 133-134 (1989) referring to a sexual harassment claim brought under a common law theory in lieu of seeking R.C. 4112.02 relief:

“On the first point there appears to be little question that R.C. Chapter 4112 is comprehensive legislation designed to provide a wide variety of remedies for employment discrimination in its various forms. Appellees agree that claims for employment discrimination must be asserted under the aegis of R.C. Chapter 4112. The issue here is whether appellees' intentional tort claims have been preempted and abolished by the General Assembly. We hold that they have not been abolished, as there is nothing in the language or legislative history of R.C. Chapter 4112 barring the pursuit of common-law remedies for injuries arising out of sexual misconduct. Our review of R.C. Chapter 4112 reveals only one limitation and that provision bars any law which would be inconsistent with the remedial purpose of the chapter....”

Thus it is clear Ohio R.C. 4112.02 is not an exclusive remedy for employment discrimination as the Appellant insists citing *Fletcher v. Coney Island, Inc.*, 165 Ohio St. 150, 154 (1956) given the common law public policy against age discrimination tort remedy is a cumulative one that may be asserted in addition to rights found in Ohio R.C. 4112.02, or the ADEA, 29 USC 621. *Compare, Ferraro v. B.F. Goodrich Co.*, 149 Ohio App. 3d 301, 316 (2002)(citing *Livingston and Kulch* decreeing the statutory exclusive-remedy provisions in R.C. Chapter 4112 do not preclude a plaintiff's pursuit of all other remedies); *Balyint v. Arkansas Best Freight Sys.*, 18 Ohio St. 3d 126, 130 (1985)(R.C. 4123.90 is not an exclusive remedy for worker's compensation retaliation and common law wrongful discharge cause of action is available in addition to statutory relief). In fact in *Fletcher*, at paragraph two of the syllabus, this Court expressly held that the language of the statutes at issue in that case demonstrated “a plain purpose and intent on the part of the General Assembly to restrict the remedies or penalties available to those expressly provided.” And in *Kulch* this Court held “*Fletcher*... involved a situation wherein this court held, and the parties to the litigation apparently agreed, that there would have been absolutely no cause of action or remedy for the conduct at issue in *Fletcher*...in the absence of legislation, and that any right of action by the plaintiff was exclusively within

the province of the legislature...Such is not the case in the area of employment at will.”
78 Ohio St. 3d at 160. (Citations omitted). As *Helmick* made clear, such is not the case in
a controversy over the availability of common law wrongful termination remedies in a
R.C. 4112 underpinned cause of action either.

Appellant next argues:

“*Greeley* established a limited public policy exception affording
judicial relief to employees terminated in violation of a statute that
provides no independent private cause of action.” (Appellant’s brief at 11-12).

Appellee responds to the Appellant’s analysis by noting that with respect to
Greeley, this Court did not express an “intention to create a limited exception to the
employment at-will doctrine” so as to foreclose the availability of the public policy tort
cause of action to litigating violations of statutes that did not contain specific remedies
for their violation. (*Id.* at 11). In *Greeley* this Court was concerned that not only was an
employer violating R.C. 3113.213 (D) by discharging an employee to evade making a
court ordered child support wage assessment, but took issue with the fact that the
employer could “buy their way out of a court order” by paying a small fine to the
government for discharging the employee leaving him without a meaningful remedy for
the wrongful discharge. 49 Ohio St. 3d at 232. The case was limited to its facts, but the
dictum opened the door for further possibilities: “Today we only decide the question of a
public policy exception to the at-will doctrine based upon a violation of a specific statute.
This is not to say there may not be other public policy exceptions to the doctrine, but of
course, such exceptions would be required to be of equally serious import as the violation
of a statute.” 49 Ohio St. 3d at 234-235.

The Appellant goes on:

"*Painter* established that the public policy exception should not be used to override statutory scheme established by the General Assembly." (Appellant's brief at 12).

Appellee responds by noting that *Painter* did not subordinate this Court's duty to enlarge and administer the common law to the prerogative of the legislature as the Appellant on brief suggests:

"“When the common law has been out of step with the times, and the legislature, for whatever reason, has not acted, we have undertaken to change the law, and rightfully so. After all, who presides over the common law but the courts?” Today we reaffirm *Greeley* and hold that an exception to the employment-at-will doctrine is justified where an employer has discharged his employee in contravention of a “sufficiently clear public policy.” The existence of such a public policy may be discerned by the Ohio judiciary based on sources such as the Constitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law. ... We have confidence that the courts of this state are capable of determining as a matter of law whether alleged grounds for a discharge, if true, violate a “Clear public policy” justifying an exception to the common-law employment-at-will doctrine, thereby stating a claim. ... We note as well that a finding of a "sufficiently clear public policy" is only the first step in establishing a right to recover for the tort of wrongful discharge in violation of public policy. In cases where this required element of the tort is met, a plaintiff's right of recovery will depend upon proof of other required elements. Full development of the elements of the tort of wrongful discharge in violation of public policy in Ohio will result through litigation and resolution of future cases, as it is through this means that the common law develops....”

Painter v. Graley, 70 Ohio St. 3d 377, 384 (1994).

The Appellant then argues:

"*Collins* limited its holding to those situations in which the underlying statutory scheme was insufficient to protect the underlying public policy." (Appellant's brief at 13).

Appellant responds by noting that *Collins* actually supports the Appellee's claims given that the decision allowing the use of a public policy tort claim exception to the at-will doctrine was based at least in part on the public policy against discrimination found in Ohio R.C. 4112.02 and moreover, the Court found R.C. 4112.02 did not preempt the

litigation of common law rights and remedies underpinned by that statute because there was no remedial preemption. 73 Ohio St.3d at 73.

Appellant further claims:

“In *Kulch*, this Court reiterated its prior holding that the existence of a public policy claim premised upon statutory enactments is limited to situations in which the underlying statute does not provide an adequate remedial scheme.” (Appellant’s brief at 17).

The Appellee responds by noting that *Kulch* did not express such an exacting limitation. *Kulch* was a retaliation case where the plaintiff was fired for filing an OSHA complaint and after this he filed a civil suit for wrongful termination under a statutory and common law cause of action plead in the alternative seeking redress for the same injury. 78 Ohio St. 3d at 135-137. This Court made clear in finding for the plaintiff that an at-will plaintiff could sue for an independent violation of the public policy expressed in a remedial statute whether or not he also complied with the prerequisite jurisdictional terms of an additional statute regulating the same conduct, and whether or not he also sued for a specific violation of the statute as long as there was no proof that the legislature intended that the statutory remedy was an exclusive one. *Id.* at 162.

Accordingly, for the Appellant to next argue that “Leininger’s Wrongful Termination Claim Finds No Support in the Decisions of This Court and Therefore Fails as a Matter of Law” (Appellant’s brief at 17) because it is “readily distinguishable from the cases discussed above” is sheer nonsense. We note that in arriving at its conclusion here, the Appellant omits an analysis of the *Livingston* decision which as discussed *supra* directly supports the Appellant’s case, and cites no evidence that R.C. 4112 *et seq.* has

been decreed by the Ohio Legislature or this Court to be an exclusive remedy for age discrimination which preempts all others.

Appellee's Reply to Appellant's Argument Part C

Appellant's argument at Part C of its brief reads:

"This Court Has Conclusively Established That A Public Policy Claim Is Not Available If The Statute Providing The Public Policy Contains An Adequate Remedial Scheme." (Appellant's Brief at 17).

To underpin its argument here, the Appellant cites *Wiles v. Medina Auto Parts*, 96 Ohio St. 3d 240 (2004) a case which was argued by the undersigned to this Court seeking to establish a public policy tort exception to the at-will doctrine for Family and Medical Leave Act (FMLA) retaliation claims. *See*, 29 USC Section 2601 *et seq.* This Court refused to allow such a claim advising "when viewed as a whole, the FMLA's remedial scheme provides an employee with a meaningful opportunity to place himself or herself in the same position the employee would have been absent the employer's violation of the FMLA" and thereby found it was not necessary to recognize the separate tort cause of action because the statute afforded allegedly all relief needed to vindicate FMLA violations. *Id.* at 245. Yet the undersigned suggests that *Wiles* should be limited to its facts and deemed not controlling in this case for a number of reasons: First, *Wiles* was an FMLA case, not an age discrimination case. Unlike anti-discrimination statutes such as R.C. 4112 or Title VII of the Civil Rights Act of 1964, 42 USC 2000 *e et seq.* or the Age Discrimination in Employment Act, 29 USC 623 *et seq.* the FMLA is a compromise statute meant to "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests

in preserving family integrity...” 29 USC 2601 (b)(1). Accordingly, although *Wiles* found there is a clear public policy in the FMLA against employer retaliation for an employee taking FMLA leave; --the limited wage loss and reinstatement remedies available for FMLA retaliation are the product of a legislative balancing of the demands of running a business against the need of an employee to take leave, and as such, the kind of remedial justice built into the FMLA is not comparable to the make whole vindication and deterrence relief available in common law torts seeking to end age discrimination in the workplace. *See, Wiles*, 96 Ohio St. 3d at 245. The public policies to be served in the FMLA are different from that in age discrimination causes of action. Moreover, in statutory discrimination claims, the plaintiff must prove the defendant employer’s intent to violate a discrimination statute, i.e. discriminatory intent. *Mauzy v. Kelly Services, Inc.* 75 Ohio St. 3d 578, 583 (1996). In a public policy tort claim, on the other hand, as *Collins supra*, in effect made clear; the dispositive issue is proof of the employer’s conduct which jeopardizes Ohio public policy, which may or may not be the equivalent of proof of a specific intent to violate a statute whose policy may in part underpin the claim. *See also, Kulch*, 78 Ohio St. 3d at 151. And in *Wiles* this Court held “here, the sole source of the public policy opposing the discharge is a statute that provides the substantive right and remedies for its breach.” 96 Ohio St. 3d at 244. As already demonstrated, this is not the case in Appellee’s age discrimination tort claim. Secondly, a cumulative reading of the public policy tort claim cases decided by this Court make clear that this Ohio Supreme Court has allowed claims for wrongful discharge to be brought where two or more separate and independent remedies exist regardless of the adequacy of any one particular remedy given as it is for the victim, and not the tort-feasor

to make an election of remedies in a civil case. Cf., *Kulch*, 78 Ohio St. 3d at 162. This position is consistent with the U.S. Supreme Court's ruling in discrimination cases including *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 458 (1975) where the high court held citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." The Ohio legislature is not on record as decreeing it is Ohio public policy to limit the right of an employee to seek all available relief for discrimination through an election of remedies. Third, this Court held that "the FMLA prohibits what Wiles alleges Medina Auto Parts to have done here -discharging him for exercising his right to FMLA leave." 96 Ohio St. 3d at 243. However, in reaching its conclusion, this Court avoided discussion of the fact that it was not clear from the record, since the case was dismissed prior to the taking of deposition or other discovery, if Mr. Wiles was able, like the plaintiff in *Collins* with respect to R.C. 4112.02 violations, to use the FMLA as a source of public policy and redress under a common law tort theory because he worked for a company with less than 50 employees which is the jurisdictional limitation for filing FMLA claims. 29 USC 2611 (4). Therefore, there was a set of FMLA violation facts that this Court has not considered when deciding the outcome of *Wiles* that if considered in the future could result in a decision for the plaintiff based upon the same logic used in *Collins* regarding extending the reach of the public policy underpinned by R.C. 4112 *et seq.* to employers of four or less persons. In short, *Wiles*, a plurality opinion, leaves unanswered questions that should be left open for future examination in another FMLA public policy tort case.

The Appellant next argues:

“Ohio Revised Code Chapter 4112 Provides Expansive and Complete Relief for Alleged Victims of Age Discrimination.” (Appellant’s brief at 20).

Appellee responds by noting although the Ohio legislature has a history of decreeing it wishes to protect employees from age discrimination history also shows it has had a very hard time putting this policy into the form of useful remedy made accessible to all affected employees. Indeed, as this Court found in *Fawcett v. G.C. Murphy & Co.*, 46 Ohio St. 2d 245, 247, 249 (1976), *modified by Greeley*, 49 Ohio St. 3d at syllabus par. 2., although Ohio R.C. 4101.17 prohibited age discrimination in the interview or discharge of employees between ages forty and sixty five that statute provided no civil remedy for its breach. In year 1995 Ohio R.C. 4101.17 was recodified as R.C. 4112.14 and provided employees with some but not all available relief for age discrimination. R.C. 4112.14 is the Ohio statutory remedy for age discrimination and is styled as an equitable action that does not offer the remedy of front pay, does not afford a right to a jury trial to determine a remedy, does not allow for recovery for pain and suffering, emotional injury such as disabling depression or anxiety, consequential economic losses such as financial investment losses caused by the loss of a job, nor for punitive damages so as to deter the employer from engaging in future acts of discrimination, and the age discrimination statute like the rest of R.C. 4112 *et seq.* does not apply to employers with less than four employees (Ohio R.C. 4112.01 (A)(2)) and has a 180 day statute of limitations while other R.C. 4112.02 discrimination causes of action enjoy a period of six years. *Bellian v. Bicron Corp.* 69 Ohio St.3d 517, 520 (1994) *citing Elek v. Huntington Natl. Bank*, 60 Ohio St. 3d 135 (1991); *Cosgrove v. Williamsburg of Cincinnati Management Company*, 70 Ohio St. 3d 281(1994)(6 year s.o.l. for non-age

discrimination claims under R.C. 4112.99); Ohio R.C. 4112.14 (B); *Hoops v. United Telephone Company of Ohio*, 50 Ohio St. 3d 97, 100-102 (1990). And although it is true that Ohio R.C. 4112.99 allows for a civil action to be brought for a violation of R.C. 4112; the age discrimination statute related to terminations of employment, verses other kinds of age discrimination in employment prohibited in R.C. 4112.02 (A) limits the relief available under 4112.99 to that expressed in R.C. 4112.14 (B) given the rule of statutory construction that holds provisions in a specific statute prevail over the terms of a general statute. Ohio R.C. 1.12; 1.51. Indeed, in *Bellian*, this Court held “(a)pplying the rule of statutory construction, R.C. 1.51, to conflicts between general and specific statutes, we have held that where there is no manifest legislative intent that the general provision prevail over the specific provision, the specific provision applies.... Here, R.C. 4112.99 is the more general statute. Consequently, R.C. 4112.99 prevails over R.C. 4112.02(N) only if there is a clear manifestation of legislative intent. Since the General Assembly has not shown such an intent, the specific provision, R.C. 4112.02(N), must be the only provision applied.” 69 Ohio St. 3d 519 (emphasis added). The Appellee further notes that this Court has suggested a public policy violation is not properly vindicated where there is no “punitive damages hammer” available to deter the conduct of the employer from future violations. *Compare, Rice v. Certainteed Corporation*, 84 Ohio St. 3d 417, 419-420 (1999) (punitive damages available for other R.C. 4112.99 claims as the statute possesses a deterrent component concerned with preventing socially noisome business practices). In light of this, Ohio R.C. 4112.14 and 4112.02 (N) arguably trivialize discriminatory conduct of an employer via reducing its liability for statutory violations to the risk of paying a mere fine based upon the value of the employee’s back

pay, which can be of little economic consequence to an employer, and hence little incentive to change behavior, when the fired employee makes a minimum wage, or has been out of work for less than 180 days, or a year which is the time frame that a typical civil suit must be tried. The undersigned suggests there is an inherent injustice present when the Legislature agrees age discrimination in employment is a problem that must be cured but then helps employers avoid lawsuits for Revised Code violations with a short limitations statute knowing the cases to be filed will come from people who are devastated and cannot be expected to "start over" with a new career at age 60 for example, as in the case of Appellee Marlene Leininger. Quite simply, there is no credible argument that can be made that shows R.C. 4112 in its present form deters employers from engaging in age discrimination and compensates employees with make whole relief. The age discrimination remedy in the Revised Code is a signal that the legislature acknowledges a need but is indifferent as to providing meaningful remedies to vindicate the public policy against age discrimination and accordingly, the *Livingston* case attempts to correct this unjust state of affairs by authorizing a common law tort claim for age discrimination in violation of Ohio public policy.

In light of this, the Appellant goes on:

"The Court of Appeals Incorrectly Held That *Wiles* Was Not Controlling On The Issue Of Whether Appellee Could Establish the Jeopardy Element Of Her Wrongful Discharge Claim" (Appellant's brief at 21); "Given the expansion of statutory remedies afforded to victims of age discrimination since *Livingston* was decided, it is no longer necessary for this Court to supplement the statutory scheme with common law remedies" (*Id.* at 22) and further; "Under the holding of *Wiles*, *Livingston* should be expressly overruled as it no longer provides the appropriate framework for analyzing the propriety of a wrongful termination tort claim premised upon the age discrimination statute." (*Id.* at 23).

The Appellee begs to differ with the Appellant's point of view here. Aside from the fact *Wiles* was an FMLA case and did not address the issue of age discrimination as did *Livingston*, and unlike the Ashland County Trial Judge; the Ohio Fifth District Court of Appeals followed this Court's law in *Livingston* because it had a duty to do so and it made logical sense to do so in any event. (Appendix 2, 5th Dist. Opinion and Order at 8, Appx pg. 30). Indeed, the foregoing analysis by Appellee shows that the *Livingston* exception to the at-will doctrine is needed to afford wrongfully discharged employees make whole relief for age discrimination. The *Livingston* case further provides a fair chance to assert the relief given the statute of limitations for public policy tort claims is four years and not 180 days, and serves to deter employers from engaging in future age discrimination by allowing punitive damages as a remedy. *Pytlinski*, 94 Ohio St. 3d at 81 (4 year s.o.l. for public policy tort claims). Accordingly, this Court's decision in *Livingston* and the decision of the Fifth District Court of Appeals below following that case should be upheld for obvious reasons.

Appellee's Reply to Appellant's Argument Part D

"D. Appellee Cannot Establish The Elements Of Her Claim For Wrongful Termination in Violation Of Public Policy Because The Public Policy Underlying Her Claim Is Not In Jeopardy." (Appellant's brief at 24).

Here the Appellant argues citing its own brief "as the above discussion demonstrates, Chapter 4112 contains a comprehensive remedial scheme, which is more than adequate to protect alleged victims of employment discrimination" *Id.* Appellant goes on "the fact that Leininger cannot obtain certain remedies under the statute as result of her failure to comply with the statute of limitations does not warrant a finding of jeopardy in this case...the fact is that Leininger, having failed to bring her statutory claim

in a timely fashion is now trying to bootstrap a statutory discrimination claim onto a wrongful termination claim which is not permitted under Ohio law.” *Id.* at 24-25. “Put simply, the only jeopardy that exists in this case was created by Leininger’s failure to comply with the applicable statute of limitations.” *Id.* at 25. The Appellant then likens the Appellee’s case to the plaintiff’s case in *Lewis v. Fairview Hospital*, 156 Ohio App. 387 (2004). In light of this, the first problem with the Appellant’s argument is that as we have seen, R.C. 4112.02 does not provide a comprehensive remedy for age discrimination plaintiffs and what has been provided is grossly inadequate and unjust. Secondly, Appellant’s attempt to liken Appellee Leininger to the plaintiff in *Lewis v. Fairview Hospital*, 156 Ohio App. 387 (2004) is misplaced and not dispositive. Although it is true Maleria Lewis was accused by the 8th District Court of Appeals of “nothing more than an attempt to bootstrap a discrimination claim onto a wrongful termination claim as a result of failing to file her discrimination action within 90 days of receiving a right to sue letter” the fact is that case dealt with a violation of Title VII remedies, not R.C. 4112.02, and under *Livingston* and *Collins* she was allowed to pursue alternative theories of recovery for discrimination under a public policy tort exception theory contrary to that Court’s opinion. Indeed, we have already discussed in detail the fact that R.C. 4112.02 does not preempt common law wrongful discharge tort remedies as *Livingston* and *Collins* made clear, and ultimately an election of remedies is for the Appellee to make and not the Appellant. Moreover, as an aside, in *Lewis* the plaintiff was fired from a nursing job at Fairview Hospital, and her original legal counsel (not affiliated with the undersigned) obtained an EEOC right to sue letter for race discrimination and retaliation charges filed pursuant to Title VII, 42 USC 2000 e, but then plead the Ohio retaliation statute, R.C.

4112.02 (I) to vindicate the violation of her federal rights. Yet pursuant to *Chandler v. Empire Chem., Inc.*, 99 Ohio App. 3d 396, 402 (1995), *discretionary appeal not allowed* 72 Ohio St. 3d 1415 (1995), Ohio R.C. 4112.02 (I) cannot be used to remedy violations of Title VII, and once her original counsel discovered the error, he panicked and dismissed the case without prejudice in lieu of seeking to amend the pleadings, while the case was pending a defense motion for summary judgment after the applicable statute of limitations had run, abandoning Ms. Lewis on the courthouse steps and leaving her to refile her case *pro se*, outside of any savings statute remedy. Ms. Lewis later hired the undersigned to resolve her refiled case and then the public policy tort claim was inserted into an amended complaint. However, the trial court did not permit the new plaintiff's counsel to conduct deposition discovery required to assemble the new case to oppose a motion for summary judgment and it was thus unavoidably dismissed with the Ohio 8th District Court of Appeals affirming on appeal and advising Ms. Lewis, who the trial court cruelly called a "race baiter", that she was somehow at fault for not pursuing her claims in a more timely fashion. So much for fairness and justice in that case. All of this being so, *Lewis* is not an *en banc* decision and is contradicted by another 8th District panel which recognizes a cause of action may be brought under R.C. 4112.02 for public policy tort claims alleging age discrimination in the 8th District. *See, Leonardi v. Lawrence Indust., Inc.*, No. 72313, 1997 Ohio App. LEXIS 4014 (Ohio Ct. App. 8th Dist. Sept 4, 1997)(Appendix 3). Accordingly, the Appellant's argument that "the only jeopardy that exists in this case was created by Leininger's failure to comply with the applicable statute of limitations" is unfounded nonsense. *Livingston* made a cause of action for age discrimination available to the Appellee and she made use of it in good faith. There is

no case that the Appellant can cite to that requires the Appellee to not rely on this Court's current case law when pursuing her claims.

Appellee's Reply to Appellant's Argument Part E

The Appellant argues:

“The Majority of Ohio Courts of Appeal Have Reached The Same Conclusion Advanced By Appellant's And Dismissed Public Policy Claims Premised Upon Alleged Acts of Employment Discrimination.” (Appellant's brief at 26-27).

The Appellant cites cases from five jurisdictions (three State appellate and two U.S. District Court trial court jurisdictions) to make its point, but three state appellate jurisdictions are not a “majority” of Ohio Courts. Moreover, the case law cited by Appellant is misleading and/or inaccurately described and have issued conflicting opinions within those jurisdictions. For example, in the Second District case *Gessner v. City of Union*, 159 Ohio App. 3d 43 (2004) the Court held in spite of its earlier *Barlowe* opinion cited by Appellant Pioneer that “public policy claims are allowed for wrongful discharge based on age discrimination.” As noted, in the Eighth District age discrimination claims brought under a public policy tort theory have been allowed under *Leonardi*. The Federal 6th Circuit Court of Appeals recognizes a public policy tort claim exception to the at-will doctrine for age discrimination cases as well, which would seem to swallow all of the Appellant's cited District Court case opinions contrary. *See, Stephens v. Kettering Adventist Healthcare*, 182 Fed. Appx. 418 (CA6, 2006). With respect to *Kanieski v. Sears, Roebuck & Co.*, 2003 Ohio 421 (Cuyahoga App. No. 80833) that case does not indicate at Par. 29 that there is no public policy tort remedy for age discrimination plaintiffs as the Appellant avers. With respect to *James v. Delphi*

Automotive Systems, 10th Dist. No. 04 AP-215, 2004 Ohio 5493, that case is based upon *Berge v. Columbus Community Cable Access*, 136 Ohio App. 3d 281, 306-307 (1999) which made clear cannot a plaintiff successfully plead an alternative cause of action for wrongful discharge in violation of public policy where the basis for her claim is an alleged violation of R.C. 4112.02. Therein lies the catch, there is no evidence in the current appeal that the Appellant is suing for a violation of R.C. 4112.02, but a separate violation of Ohio public policy which is an independent basis to bring an age discrimination tort claim.

Appellee's Reply to Appellant's Argument Part F

Lastly, the Appellant argues:

"The Majority of Other Jurisdictions Throughout The United States Apply The Rule Advanced By Appellant's And Refuse To Permit A Wrongful Discharge Claim If Statutory Remedies Are Sufficient To Redress The Alleged Injury." (Appellant's brief at 28-29).

The Appellee responds to this argument by noting that Appellant's citing an American Law Review article giving one lawyer's opinion about what the law is, and cases from eight states out of the fifty in our United States does not make for a majority opinion about anything. We need not spend any further time on this ridiculous argument.

Appellee's Response to the Appellant's Proposition of Law No. 2

In its Proposition of Law No. 2, the Appellant argues:

"A plaintiff cannot state a cause of action for wrongful discharge in violation of public policy embodied in a statute unless the plaintiff has strictly complied with the procedural requirements of the underlying statute, including the applicable statute of limitations." (Appellant's brief at 30). And further that "This Court Should Respect The Province Of The Legislature And Prohibit The Use Of The Wrongful Termination Tort

To Subvert The Statute Of Limitations Established By The General Assembly In Enacting Chapter 4112.” *Id.*

Appellee responds to this by noting at the outset that the Ashland County Trial Court did not find the statute of limitations in R.C. 4112.02 (N) was a reason for dismissing the case below (Appendix 1, Ashland County Ct. Common Pls. Opinion and Order at 16, Appx pg. 17) by way of declining to reach the issue. After the limitations defense was raised on appeal by the Appellant in the 5th District as a reason for affirmance, the Court of Appeals advised in light of *Pytlinski*, 94 Ohio St. 3d 79-80 which decreed that the 180 day statute of limitations for a violation of R.C. 4113.52 did not apply in a public policy tort claim case; that the 180 days statute of limitations applicable to claims brought under R.C. 4112.02 (A) did not apply in this case either. (Appendix 2, Opinion and Order of 5th District Court of Appeals at 10, Appx pg. 32). The Appellee suggests that the 5th District’s opinion makes perfect sense and there is no reason to overturn it given the Appellee did not pursue a statutory age discrimination case, but a cause of action for a violation of public policy following *Livingston*. See, Complaint in Case No. 05-CIV-143 at par. 21, 22 and 24 citing *inter alia*, *Livingston*, *Pytlinski*, and *Celeste v. Wiseco Piston*, 151 Ohio App. 3d 554 (2003). This is not a case where, according to the Appellant, this Court is “negating” a legislative determination regarding a statute of limitations by allowing the Appellee’s claim to go forward on a non-statutory cause of action. According, the lower Court of Appeals opinion should be affirmed.

In spite of this, the Appellant goes on:

“Chapter 4112 Contains an Unambiguous Statute of Limitations and This Court Should Not Permit Individuals to Bypass the Limitations Period Through the Use of the Common Law Public Policy Tort.” (Appellant’s brief at 30). Moreover, Important

Policy Interests Are Served by Enforcing Statutes of Limitations Enacted by the General Assembly.” (*Id.* at 32).

Here the Appellant argues “an individual claiming age discrimination is well aware of the discriminatory conduct almost immediately and such individuals should not be permitted to delay filing a cause of action thereby hindering the effective defense of that claim.” (*Id.* at 31). The Appellant who has in fact discriminated against the Appellee insists she “could have filed a statutory age discrimination claim pursuant to R.C. 4112.14” and wants this Court to help her “have her cake and eat it to.” (*Id.* at 32). In spite of the Appellant’s theatrics; the fact is like the plaintiff in *Collins*, Ms. Leininger was not required to elect the limited statutory discrimination remedy to bring her case forward, as previously discussed. Moreover, the Plaintiff-Appellee’s deposition record shows that Appellee was understandably emotionally distraught after being fired and was lied to by the Appellant as to the reasons given for her termination and only after she had over a year of time to gain some perspective and hear from witness Tanya Rishel about Appellant McCormick replacing her did she figure out what had really happened at Pioneer. (Plaintiff’s brief in opposition to summary judgment at 9; Appellant’s supplement at 59 citing Meyer’s false testimony that Marlene Leininger was fired solely due to a corporate downsizing; and page 16, Appellant’s supp’t at 66). Given the “discovery rule” is not available in R.C. 4112.02 discrimination cases to trigger the running of statute of limitations at a point in time after employment termination when the discrimination is actually discovered; if we take the Appellant at its word, every elderly plaintiff must file a lawsuit for age discrimination within 180 days of being fired whether they know why they have really been fired or not so as to preserve their rights. *Oker v. Ameritech Corporation*, 89 Ohio St. 3d 223 (2000)(limitations begins to run on date of

termination in R.C. 4112.02 cases). This Court could hardly agree that requiring this on the part of over age 40 terminated employees would be good judicial policy for obvious reasons. The plaintiffs in these cases are not lawyers and they should not be treated as if they are, nor deprived of a remedy because of an employer who has figured out how to lie to its elderly terminated employees and wishes to have this Court help them get away with it. The four year limitations period for a public policy tort claim is a matter of this Court's settled law. *Pytlinski*, 94 Ohio St. 3d at 81. Moreover, it is a matter of settled law that this Court has recognized public policy tort claims under *Greeley*, *Kulch*, *Collins*, and *Livingston*, and most recently affirmed such causes of action are available under various circumstances as discussed in *Wiles* and *Coolidge* and the Appellant provides no evidence that the legislature has preempted public policy tort claims addressing age discrimination, nor that age discrimination remedies under R.C. 4112.02 are fully adequate for every plaintiff, nor that there is no independent legal basis for which to bring public policy tort claims forward. The Appellant's second proposition of law which is largely based upon opposing counsel's opinion speaks to a non-issue.

Finally, the Appellant argues:

"This Court Has Affirmatively Held That A Claim For Wrongful Termination Premised Upon A Statute Will Not Lie Unless the Plaintiff Strictly Complied With The Statutory Prerequisites." (Appellant's brief at 33).

Again, for the nth time, the Appellee's case is not based upon a violation of R.C. 4112.02, but an independent and broader Ohio common law public policy tort remedying age discrimination that does not depend on the procedures in Ohio R.C. 4112 to prove a single element of the claim. *See and compare, Kulch*, 78 Ohio St. 3d at 151 (four elements of public policy tort) with *Weller v. Titanium Metals Corp.*, 102 Ohio St. 3d 8

(2004)(four elements of R.C. 4112.14 claim); Plaintiff's Complaint in Case No. 05-CIV-143 at par. 21, 22 and 24 *citing inter alia, Livingston, Pytlinski, and Celeste v. Wiseco Piston*, 151 Ohio App. 3d 554 (2003). Accordingly, there is no requirement that the Appellee comply with "statutory prerequisites." This Court held as much in *Kulch*, 78 Ohio St. 3d at 162 when dealing with the state "whistleblower statute" and a common law tort remedy underpinned by the public policy in the statute:

"We hold that an at-will employee who is discharged or disciplined for filing a complaint with OSHA concerning matters of health and safety in the workplace is entitled to maintain a common-law tort action against the employer for wrongful discharge/discipline in violation of public policy pursuant to [*Greeley*] and its progeny. Thus, appellant is entitled to maintain a *Greeley* claim against appellees whether or not he complied with the dictates of R.C. 4113.52 in reporting his employer to OSHA. We also hold that R.C. 4113.52 does not preempt a common-law cause of action against an employer who discharges or disciplines an employee in violation of that statute."

The Court went on to discuss the circumstances where the public policy tort claim is based upon a specific violation of the whistleblower statute:

"We further hold that an at-will employee who is discharged or disciplined in violation of the public policy embodied in R.C. 4113.52 may maintain a common-law cause of action against the employer pursuant to *Greeley* and its progeny so long as that employee had fully complied with the statute and was subsequently discharged or disciplined. The remedies available pursuant to R.C. 4113.52 for violations of the statute and the remedies available for the tort of wrongful discharge are cumulative. Therefore, an at-will employee who is discharged or disciplined in violation of R.C. 4113.52 may maintain a statutory cause of action for the violation, a common-law cause of action in tort, or both, but is not entitled to double recovery."

Again, therein lies the difference, that is, the Appellee is not suing for a violation of R.C. 4112.14, but the independent public policy underpinning that statute and hence there is no requirement that she comply with its terms. As this Court held in *Pytlinski*, "an action for wrongful discharge in violation of public policy is not specifically covered by any statutory section. Accordingly, we find that the limitations period for common law

claims for wrongful discharge in violation of public policy is four years as set forth in R.C. 2305.09(D).” 94 Ohio St.3d at 80. Appellant’s argument that *Pytlinski* is not applicable to the instant case as the 5th District found because *Pytlinski* did not involve a claim for wrongful discharge in violation of a public policy embodied in a statute (Appellant’s brief at 36) is flat out wrong. There is no evidence submitted in this case that the Appellee is suing for a specific violation of R.C. 4112.14. or 4112.02, *et seq.* Lastly, with respect to the argument that *Contreras v. Ferro Corp*, 73 Ohio St. 3d 65 (1995) controls this debate (Appellant’s brief at 37), the Appellant’s argument is misplaced. *Contreras* addressed a plaintiff who was discharged from his employment for whistleblowing. Mr. Contreras sued his former employer for alleged violations of the Whistleblower Statute and for wrongful discharge in violation of public policy. This Court found the question whether Contreras was entitled to maintain a cause of action for the tort of wrongful discharge was moot. *Id.* at 251. *Kulch* later reexamined the issue and found a public policy tort claim using the whistleblower statute as a source of policy was viable whether the requirements of the statute were followed or not as long as the cause of action was not in effect based solely on a violation of the terms of the statute. 78 Ohio St. 3d at 161-162. It follows that the *Contreras* case is a non-issue.

CONCLUSION AND PRAYER

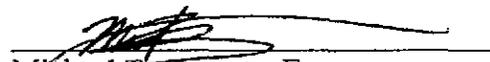
In conclusion, the Appellee cites *Kulch* which underpinned *Livingston* once more for the proposition that it is entirely appropriate to allow an age discrimination claim based upon a violation of Ohio public policy to be brought in tort in lieu of the limited statutory relief available in R.C. 4112 *et seq.*

"*Greeley* and its progeny stand for the proposition that, in Ohio, the judicially recognized doctrine of employment at will has certain limitations. One of those limitations is that the doctrine will not be followed in cases where an at-will employee is discharged or disciplined for a reason that violates a statute and thereby contravenes public policy. *Greeley, supra*, paragraphs one and two of the syllabus. The syllabus in *Greeley* makes no exception for statutes like R.C. 4113.52 that contain remedial provisions. That, of course, was no mistake. The *Greeley* public-policy exception to the doctrine of employment at will was not intended to apply only where a statute provides no civil remedies. Rather, *Greeley* and its progeny are intended to bolster the public-policy of this state and to advance the rights of employees who are discharged or disciplined in contravention of clear public policy."

So it is with the instant case, and the Appellee prays that the Ohio Fifth District Court of Appeals decision below be AFFIRMED for just cause shown and this appeal DISMISSED and this case remanded to the Ashland County Court of Common Pleas for jury trial.

Respectfully Submitted,

/s/ Michael Terrence Conway, Esq.


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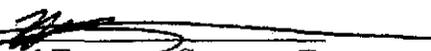
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SERVICE

Counsel for Plaintiff hereby certifies that a copy of the foregoing document was served on Counsel for the Defendant-Appellant Corey V. Crognale, Esq. at 250 West Street, Columbus, Ohio 43215-2538 on 1-25-2007 by regular U.S. Mail Service.

Respectfully Submitted,

/s/ Michael Terrence Conway, Esq.


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APPENDIX 1

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IN THE COURT OF COMMON PLEAS
ASHLAND COUNTY, OHIO

2005 OCT 17 PM 2:14

ANNETTE L. CHAW
CLERK OF COURTS
ASHLAND, OHIO

MARLENE LEININGER,

Case No. 05-CIV-143

Plaintiff,

vs.

PIONEER NATIONAL LATEX, et al.,

Defendants.

AMENDED
OPINION AND JUDGMENT ENTRY ON
MOTION FOR SUMMARY JUDGMENT

Now comes the Court pursuant to Civil Rule 60(A) and issues this Amended Opinion and Judgment Entry on the Defendants' Motion for Summary Judgment. This amended entry is issued to correct certain erroneous findings by the Court in the original entry regarding prior summary judgment proceedings by the Court in Case No. 04-CIV-075.

This case is before the Court on the Defendants' Motion for Summary Judgment. A non-oral hearing date was set in this case for September 1, 2005 and the Plaintiff filed a memorandum in opposition to the Motion for Summary Judgment. The Court finds that all parties have been given a full opportunity to plead pursuant to Civil Rule 56 and that the Motion is properly before the Court for decision.

STATEMENT OF THE CASE

The Plaintiff formerly worked for the Defendant Pioneer National Latex. She was terminated from her employment on May 5, 2001. On April 3, 2003, the Plaintiff commenced an action against the Defendant Pioneer National Latex and the Defendant Jerry Meyer in Case No. 03-CIV-099. In the complaint in that case, the Plaintiff alleged that the Defendants violated Ohio Revised Code Section 4112.02(A). The Complaint also alleged the tort of public policy wrongful termination by

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age discrimination. That case was voluntarily dismissed by the Plaintiff, without prejudice, on October 30, 2003.

On March 1, 2004, the Plaintiff re-filed the case against the same Defendants in Case No. 04-CIV-075. This second complaint alleged the tort of public policy wrongful termination by age discrimination. She also named an additional Defendant, Melissa McCormic. That case was originally set for pretrial on November 1, 2004 and jury trial on November 16, 2004. On June 28, 2004, the Defendants filed a Motion for Summary Judgment which was set for non-oral hearing on August 3, 2004. The Court subsequently granted extensions of time to both parties to file memorandums with regard to the Summary Judgment Motion and the non-oral hearing was rescheduled to October 5, 2004. Since the hearing was non-oral, the undersigned has no record to reference regarding the proceedings on the Motion.

In its original decision on the Summary Judgment Motion, the Court **inaccurately** stated that the former Common Pleas Court Judge Runyan did not enter an order denying the Defendants' Summary Judgment Motion in Case No. 04-CIV-075 and that Plaintiff's counsel did not prepare an entry to that effect after being directed to do so by the Court. Counsel for the Plaintiff has drawn this inaccuracy to the Court's attention and provided a copy of the Judgment Entry to the Court through the letter attached hereto as Exhibit A. The Plaintiff states in the letter that a copy of the Judgment Entry was attached to his memorandum in opposition to the Summary Judgment motion in this case. The Court has re-reviewed its copy of that memorandum and the Judgment Entry was not attached to that copy. It was, however, attached to the original memorandum filed with the Court by Plaintiff. Part of the confusion is that both the Judgment Entry directing the Plaintiff to prepare a Judgment Entry and the Judgment Entry overruling the Motion for Summary Judgment

and Motion for Reconsideration were docketed on the same date and at the same time. Without specific reference to the pleadings, those Judgment Entries are difficult to distinguish on the docket. The Court's original findings regarding the record in relation to the prior summary judgment proceedings were incorrect, and the Court acknowledges its error on this point.

On April 29, 2005, the Plaintiff refiled her case against the Defendants again. The refiled complaint presently pending in this case states a tort cause of action for public policy wrongful discharge based on age discrimination. The Defendants filed a motion for Summary Judgment in this case on August 4, 2005 and the Plaintiff duly responded on September 1, 2005. The Motion is the subject of this decision.

The Plaintiff has argued that the Defendants' present motion for summary judgment is barred by the prior proceedings in this case. Specifically, she argues that the Judgment Entry of November 24, 2004 in Case No. 04-CIV-075 (copy attached hereto as Exhibit B), bars the Defendants' Summary Judgment motion in this case. The Court respectfully disagrees. A Judgment Entry denying a motion for summary judgment and a motion for reconsideration thereof are interlocutory orders because they do not constitute a final judgment. The Ohio Supreme Court has held that "Civ. R. 54(B) allows for a reconsideration or rehearing of interlocutory orders. The rule, when discussing interlocutory orders, states, in pertinent part, that they are 'subject to revision at any time before the entry of judgment adjudicating the claims and the rights and liabilities of all the parties.'" *Pitts v. Ohio Dep't of Transportation* (1981), 67 Ohio St.2d 378, 379. Therefore, this Court had inherent authority to reconsider its decision denying the summary judgment motion and motion for reconsideration in Case No. 04-CIV-075, while that case was still pending. If the Court had inherent authority to reconsider the rulings while the case was still pending, it has

authority to reconsider the issues in a new case filed after a dismissal other than on the merits. An interlocutory order is not entitled to any *res judicata* effect given the express provisions of Civil Rule 54(B). The Court is of the opinion that the November 24, 2004 Judgment Entry denying the Defendants' Motion for Summary Judgment and Motion for Reconsideration does not bar a ruling by the Court herein in this case and the Court therefore proceeds to consider and decide the motion herein despite the ruling on a prior motion in a prior case between the parties.

LEGAL STANDARD APPLICABLE TO THE MOTION

Summary judgment is a procedural device to terminate litigation where there is nothing to try. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1. It must be awarded with caution, being careful to resolve doubts and construing evidence against the moving party and in favor of the non-moving party. See: *State ex rel Morley v. Lordi* (1995), 72 Ohio St. 3d 510; *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356; *Osborne v. Lyles* (1992), 63 Ohio St. 3d 326; and *Norris v. Ohio Std. Oil Co. supra*.

To grant a motion for a summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure, a Court must find the following: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317.

The primary function and duty of the Court in passing upon a motion for summary judgment is to determine whether or not there is any issue of fact to be tried. *Cunningham v. J.A. Myers*

Co. (1964), 176 Ohio St. 410 and *Houk v. Ross* (1973), 34 Ohio St. 2d 77. It is the duty of a Court on a summary judgment motion not to try issues of fact, but rather to determine whether such issues actually exist. If there are genuine issues of fact, the motion for summary judgment must be denied. *Harshbarger v. Muridian Mutual Insurance Company* (1974), 40 Ohio App. 2d 296.

A "genuine issue" of fact exists when there is a bona fide factual dispute concerning a fact which is material within the context of the substantive law of claims and defenses applicable to the case. This standard has been described as follows:

[A] "genuine issue" exists when the evidence presents "a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." . . . In order for the evidence to be in "sufficient disagreement," the court must "ask [itself] * * * whether a fair minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence upon which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- whether there is evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. 242, 251-252. The critical inquiry for the Court in determining if genuine issues of material fact exist is whether the evidentiary material presents "a sufficient disagreement to require submission to a jury" or is "so one-sided that one party must prevail as a matter of law." *Turner v. Turner, supra*, p. 340.

In deciding whether an evidentiary conflict exists so as to preclude summary judgment, a trial Court is required to adhere to Rule 56(C) and view the facts in the light most favorable to the party opposing the motion. *Turner v. Turner* (1993), 67 Ohio St. 3d 337 and *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St. 3d 135. Even the inference to be drawn from

the underlying facts contained in the various affidavits and depositions must be construed in the non-moving party's favor. *Turner v. Turner, supra* and *Hounshell v. Am. States Ins. Co.* (1981), 67 Ohio St. 2d 427.

Since summary judgment represents a shortcut through the normal litigation process by avoiding a trial, the burden is strictly upon the moving party to establish, through the evidentiary material permitted by the rule, that there is no genuine issue of material fact and that the movant is therefore entitled to judgment as a matter of law. *AAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St. 3d 157, syllabus paragraph 2. The movant has the burden to prove all determinative issues in a motion for summary judgment. *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112. The non-movant has no burden of persuasion in a motion for summary judgment, regardless of the non-movant's burden of proof at trial. *Mitseff, supra* and *AAA Enterprises, supra*.

Although the non-movant has no burden of persuasion, the non-movant cannot sit idle when a motion for summary judgment is made. Civil Rule 56(E) provides that: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

ISSUES FOR REVIEW

The Defendants' Motion for Summary Judgment contains four (4) prongs upon which the Defendants claim they are entitled to judgment:

1. Leininger's public policy claim must be dismissed as she cannot satisfy the procedural requirements for filing an age discrimination claim pursuant to Ohio Revised Code Section 4112.02(A).

2. Leininger's public policy claim fails as a matter of law because she cannot establish that her termination jeopardizes public policy.

3. There exists no direct evidence of age discrimination.

4. There is no indirect evidence of age discrimination.

OPINION OF THE COURT

Under Ohio law, an employee who does not have a contractual or statutory right to employment is considered an employee-at-will and may be terminated at will for any cause, unless the termination falls within some exception to the employment-at-will doctrine. Courts have created tort exceptions to the employment-at-will doctrine. One of the most recognized tort exceptions to the doctrine, and the exception at issue in this case, is the public policy wrongful discharge tort. It has not been alleged in this case that the Plaintiff had any particular right to employment that took her outside of the employment-at-will doctrine. It is alleged, however, that she was terminated from her employment in violation of public policy and that therefore she is entitled to recover tort damages for wrongful discharge. The specific public policy at issue is age discrimination.

In 1990, the Ohio Supreme Court recognized the tort of wrongful discharge in violation of public policy as an exception to the employment-at-will doctrine. *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228. The issue in that case was whether or not a violation of Ohio Revised Code Section 3113.213(D) gives rise to a civil cause of action for damages when an at-will employment relationship is terminated by an employer solely because of

a court-ordered child support wage assignment of the employee's wages. The statute alleged to have been violated by the employer provided that "no employer may use an order to withhold personal earnings * * * as a basis for discharge of * * * an employee." The statute provided that an employee could recover a fine from the employer, but there were no statutory provisions for other remedies, such as restitution, reinstatement or back pay. The Court held that the statute sets forth a public policy which prohibits the use of a child support wage withholding as a basis for terminating an at-will employee. The Court held that "public policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute." *Id.* at 234.

The Ohio Supreme Court further examined the public policy exception to the at-will employment doctrine in *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134. The *Kulch* decision was decided in April 1997. In July of 1997, the Supreme Court summarily reversed a Trumbull County Court of Appeals decision in an age discrimination public policy tort case, without opinion, and based upon the *Kulch* case, in *Livingston v. Hillside Rehabilitation Hospital* (1997), 79 Ohio St.3d 249. Since the Plaintiff has cited these cases as the underpinning of her arguments in opposition to summary judgment, a detailed consideration of the cases is warranted herein.

In the *Kulch* case, the Plaintiff filed a complaint against his former employer for violations of Ohio's Whistleblower Statute, R.C. 4113.52, and wrongful discharge in violation of public policy. The trial court held that the Plaintiff did not comply with the Whistleblower statute because he did not give written notice to the employer of his complaint as required by law. The trial court therefore held that the employer was entitled to judgment as a matter of law on both the Whistleblower

claims. The Court also held that the Whistleblower statute had "preempted the field so that * * * a public policy exception to the employment-at-will doctrine does not exist in Ohio for whistleblowing." The trial court's decision was affirmed on appeal. On appeal to the Supreme Court, the Court reversed portions of the trial court's decision. The Supreme Court held that the Plaintiff had stated a cause of action for a statutory claim under one portion of the Whistleblower statute and therefore reversed that portion of the trial court's judgment in part. The Supreme Court further reversed the trial court's decision on the public policy tort.

In reversing the public policy tort portion of the decision, the Supreme Court adopted and established elements of the tort as follows:

1. That [a] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).
2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element).
3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element).
4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element). (Emphasis sic.)

The Supreme Court had previously recognized those elements in the cases of *Painter v. Graley* (1994), 70 Ohio St.3d 377 and *Collins v. Rizkana* (1995), 73 Ohio St.3d 65. In *Collins*, the Court held that the clarity and jeopardy elements of the tort of wrongful discharge in violation of public policy are questions of law to be determined by the Court, and that the causation and overriding justification elements are questions of fact, to be decided by the trier-of-fact. *Id.* at 70.

In considering the clarity element in the context of a whistleblowing situation, the *Kulch* Court held that federal law which prohibited employers for retaliating against employees who file

OSHA complaints and O.R.C. Section 4113.52 were "clear public policy" manifested in statute favoring whistleblowing. *Kulch* at 152. The Court further held, with regard to the jeopardy element, that "the civil remedies set forth in R.C. 4113.52 are not adequate to fully compensate an aggrieved employee who is discharged, disciplines, or otherwise retaliated against in violation of the statute." *Kulch* at 155. The Court rationalized that conclusion as follows:

The remedies available pursuant to R.C. 4113.52 are not sufficient to provide the complete relief that would otherwise be available in a Greeley-based cause of action for the tort of wrongful discharge. **The statute does not provide for certain compensatory damages and does not specifically authorize recovery of punitive damages.** Most important, the statute permits the court to fashion an award based upon whatever the court deems to be appropriate. See R.C. 4113.52(E). Clearly, the relief available to a whistleblower under a statutory cause of action comes nowhere near the complete relief available in an action based upon the Greeley public-policy exception to the doctrine of employment at will. In our judgment, the relief available in an action for the tort of wrongful discharge merely complements the limited statutory relief available pursuant to R.C. 4113.52. Thus, we find that the mere existence of statutory remedies for violations of R.C. 4113.52 does not operate as a bar to alternative common-law remedies for wrongful discharge in violation of the public policy embodied in the Whistleblower Statute.

Id. at 157.

Based upon its decision in *Kulch*, the Ohio Supreme Court summarily overruled a Trumbull County Court of Appeals decision in an age discrimination matter in *Livingston v. Hillside Rehabilitation Hospital, et al.* (1997), 79 Ohio St.3d 249. In *Livingston*, the trial court held that the Plaintiff had a complete remedy under Ohio Revised Code Section 4101.17, which remedy was unlimited and included the same types of remedies sought in her common law tort claim, including compensatory and punitive damages. *Livingston v. Hillside Rehabilitation Hospital* (11th Dist. Ct. App. 1997), 1997 Ohio App. LEXIS 244, page 5. Significantly, the trial court's

decision was in accord with four (4) prior federal court cases in Ohio which held that an employee could not maintain a public policy tort action for age discrimination because the statutory remedies for that type of discrimination precluded the required finding on the element of jeopardy. See, *Emser v. Curtis Industries* (U.S. Dist. Ct. Northern District, Eastern Division 1991), 774 F. Supp. 1074; *Pozzobon v. Parts for Plastics* (U.S. Dist. Ct. Northern District, Eastern Division 1991), 770 F. Supp. 376; *Napier v. VGC Corporation* (U.S. Dist. Ct. Southern District, Western Division 1992), 797 F. Supp. 602; and *Adleta v. GE* (U.S. Dist. Ct. Southern District, Western Division 1996), 1996 U.S. Dist. LEXIS 9122.

The only potential distinguishing factor between the statutory remedy in O.R.C. Section 4101.17 and the tort remedy with regard to age discrimination was the existence of the right to a jury trial in the tort action. There is no indication that this was argued to or considered by the trial court or court of appeals. Given that the *Livingston* Court did not write an opinion, the reason for its reversal of the decision is less than clear. Judge Cook's dissent indicates that the lack of a jury trial may have been the perceived deficiency giving rise to the jeopardy element of the public policy tort. *Id.* at 250. Ohio Courts have utilized *Livingston* for the blanket statement of law that an employee may maintain a public policy wrongful discharge tort action based on age discrimination, despite the existence of significant statutory remedies. (See cases cited below). Indeed, that is the premise and interpretation urged herein by the Plaintiff.

If the case law development regarding public policy tort ended with the *Livingston* case, perhaps there would be no dispute in this case. However, the case law continued to develop after 1997. In 2002, the Ohio Supreme Court issued the *Wiles v. Medina Auto Parts* (2002) 96 Ohio St.3d 240 decision. The Court followed the same analysis which it had set out in the *Kulch* case.

The Court proceeded to analyze the Plaintiff's public policy claim based on the Family Medical Leave Act in light of the four (4) elements of the tort. The Court found that the clarity element was established by the existence of the FMLA law. The Court moved on to consider the jeopardy element of the tort and held that the jeopardy element was not met with regard to the FMLA because "when viewed as a whole, the FMLA's remedial scheme provides an employee with a meaningful opportunity to place himself or herself in the same position the employee would have been absent the employer's violation of the FMLA." *Id.* at 245. The court noted that the employee could recover compensatory damages, liquidated damages, prejudgment interest, reasonable attorney fees and appropriate equitable relief under the FMLA. The Court held that "this combination of compensatory and equitable remedies is sufficiently comprehensive to ensure that the public policy embodied in the FMLA will not be jeopardized by the absence of a tort claim for wrongful discharge in violation of public policy." *Id.* The Court declined therefore to recognize the tort action based on the FMLA.

In *Wiles v. Medina Auto Parts*, the Plaintiff, who was also represented by Attorney Conway, urged similar arguments as are being made in this case. Specifically, it was argued that the lack of "whole tort relief", including punitive damages and compensatory damages for "anxiety and emotional distress" warrant a finding that the public policy of the FMLA will be jeopardized absent recognition of a public policy tort action. The Supreme Court rejected that argument, holding that:

Wiles reads *Kulch* more broadly than is warranted. *Kulch* does not, as *Wiles*, argues, stand for the proposition that statutory remedies are inadequate - therefore warranting a *Greeley* claim - when those remedies provide something less than the full panoply of relief that would be available in a tort cause of action for wrongful discharge.

Id. at 247. The Court specifically held that the lack of those items of recovery does not render the statutory remedies inadequate such that the jeopardy element of the tort is established. The Court's concluding remark was that "By not recognizing a *Greeley* claim based solely on an FMLA violation, we are merely deciding that the statutory remedies in the FMLA adequately protect the public policy embedded in the Act, leaving no reason for us to expand the scope of remedies that Congress has provided." *Id.* at 249.

In the aftermath of *Wiles*, federal and state courts in Ohio have had continued opportunities to evaluate whether the remedial statutory scheme for age discrimination bars a finding of jeopardy for purposes of the elements of the tort of wrongful discharge based upon public policy. Two (2) federal courts have held that the jeopardy element cannot be established and therefore there is no right to maintain a tort action for wrongful discharge based upon the public policy barring age discrimination. See *Hutchens v. Weltman, Weinburg & Reis Co., L.P.A.* (U.S. Dist. Ct. Southern District, Western Division 2005), 2005 U.S. Dist. LEXIS 21397; and *Kaltenmark v. K-Mart* (U.S. Dist. Ct. Northern District, Eastern Division 2005), 2005 U.S. Dist. LEXIS 21699. On the other hand, other courts have held that the wrongful discharge action may be maintained. See *Mercurio v. Honeywell* (U.S. Dist. Ct. Southern District, Western Division 2003); *Gessner v. City of Union* (2nd App. Dist. 2004), 159 Ohio App.3d 43; and *Ferraro v. B.F. Goodrich* (9th App. Dist. 2002), 149 Ohio App.3d 301. The existence of lower court decisions on both sides of the issue demonstrates that this particular aspect of the law of wrongful discharge based upon public policy is unsettled. None of these decisions constitute binding precedent for this Court and therefore the Court must analyze the law and make its conclusions herein.

After carefully examining the case law on both sides of this issue, the Court concurs with the rationales of the federal court decisions in *Hutchens* and *Kaltenmark*. Those decisions are carefully drafted and involve a full consideration of the jeopardy element, the Ohio Supreme Court decisions on the issue and the statutory remedies available with regard to age discrimination. On the other hand, the *Mercurio, Gessner and Ferraro* decisions rely heavily on the *Livingston* decision and do not fully consider or apply the *Wiles* decision.

While the *Livingston* decision, as a Supreme Court of Ohio decision, is clearly legal precedent which is binding on this Court, it is difficult for this Court to fully apply that decision given the lack of a rationale. The limited holding of that Court is that a Plaintiff who bases an age discrimination public policy tort wrongful discharge action solely on O.R.C. Section 4101.17 (now 4112.14), can establish the jeopardy element and the action is viable under Ohio law. The Plaintiff in this case has not alleged that her termination was in violation of O.R.C. Section 4112.14, or any other particular statute for that matter. This case is therefore distinguishable from *Livingston*. While *Livingston* was limited to whether or not a public policy tort based on 4101.17 is viable, the question in this case is whether or not the Plaintiff can file the public policy tort action given all of the statutory remedies available at law, not just those contained in O.R.C. Section 4112.14. Accordingly, while *Livingston* is binding precedent, it is not dispositive of the issues presented in this case in the Court's opinion.

The Court notes that the Plaintiff has also cited the Court to other case law in support of her arguments. The Plaintiff cites *Jones v. The Goodyear Tire and Rubber Co.* (9th App. Dist. 2004), 2004 Ohio App. LEXIS 2490. However, this case was subsequently appealed to the Ohio Supreme Court and then the case was dismissed. The Ohio Supreme Court specifically ordered that

this case shall not be cited as authority. *Jones v. The Goodyear Tire and Rubber Co.* (2005), 105 Ohio St.3d 1468. For that reason, the Court does not consider or rely upon that decision. The plaintiff has also cited the Court to *Leonardi v. Lawrence Industries, Inc.* (8th App. Dist. 1997), 1997 Ohio App. LEXIS 4014; *Ziegler v. IBP Hog Market, Inc.* (6th Cir. 2001), 249 F.3d 509; and *White v. Honda of America Mfg., Inc.* (S.D. Ohio 2002), 191 F. Supp.2d 933 in support of her arguments. The Court declines to rely upon *Leonardi* because it flatly states, without analysis, that the tort of wrongful discharge based upon age discrimination exists based upon the Supreme Court's decision without opinion in *Livingston*. The *Ziegler* decision involved a statute of limitations issue and did not involve any evaluation of the jeopardy element, therefore it is irrelevant to the jeopardy issue. The *White* decision is not persuasive to this Court for two (2) reasons: (1) it involved an underlying public policy claim of disability, rather than age discrimination; and (2) it was either decided prior to or without consideration of the Supreme Court's decision in *Wiles*.

As stated above, this Court must proceed with its own analysis of the Plaintiff's claim under Ohio law. With regard to the elements of the tort of wrongful discharge based upon public policy which are matters of law, this Court finds as follows:

1. A clear public policy exists with regard to age discrimination in federal and state statutes and the "clarity" element of the tort is fully established herein by the Plaintiff; and
2. Ohio Revised Code Sections 4112.02(N), 4112.14 and 4112.99 and the Age Discrimination in Employment Act, 29 U.S.C. §621 provide a variety of remedies for employer discrimination based upon age. The remedies available under those statutes include compensatory damages, punitive damages, injunctive relief, reasonable attorney fees, costs, and compensation for lost wages and lost fringe benefits. The Plaintiff has not identified any remedy which is available

in a wrongful discharge tort action which is not available under statute. The Court acknowledges that not all of those remedies may be available to the Plaintiff in this case because of statute of limitations issues relevant to those statutory claims. However, the Plaintiff's failure to take advantage of statutory remedies available to her in a timely fashion does not warrant a jeopardy finding in this case. The jeopardy analysis is not based upon the remedies available to a particular Plaintiff at a particular point in time. It is based upon an evaluation of whether or not the statutory remedies "adequately protect society's interests" with regard to age discrimination and provide the employee with a "meaningful opportunity to place himself or herself in the same position the employee would have been absent the employer's violation. The Court finds that under the rationale and analysis of *Wiles v. Medina Auto Parts* (2002) 96 Ohio St.3d 240 the Plaintiff has not established the jeopardy element of the tort of wrongful discharge based upon age discrimination because the statutory remedies available do adequately protect the public policy against age discrimination.

The Court therefore concludes, as a matter of law, that a cause of action for wrongful discharge in violation of public policy based upon age discrimination does not exist under Ohio law. The Court finds that the Defendants' Motion for Summary Judgment is well-taken with regard to the jeopardy element of the tort of wrongful discharge in violation of public policy. The Court finds it unnecessary to evaluate the remaining portions of the Defendants' motion for summary judgment given this finding of the Court and therefore the remaining portions of the motion are not addressed herein.

ORDER OF THE COURT

The Court hereby ORDERS that the Defendants' Motion for Summary Judgment is SUSTAINED, with regard to the jeopardy element of the tort of wrongful discharge in violation of public policy, and it is ORDERED that this case be and hereby is dismissed, with prejudice. It is further ORDERED that costs of this case are taxed to Plaintiff. This is a final appealable order.

It is so ORDERED.

Deborah E. Woodward

DEBORAH E. WOODWARD
Judge of the Court of Common Pleas

cc: Attorney Conway
Attorney Crognale

Michael Terrence Conway, Esq.

Attorney and Counselor at Law

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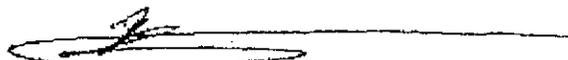
CORRECTED VERSION

Hon. Deborah E. Woodward
Court of Common Pleas
Ashland County Court House
142 West Second Street
Ashland, Ohio 44805

Re: *Leininger v. Pioneer National Latex et al.*, Case No. 04 CIV 075

Dear Judge Woodward,

I noticed in your order dismissing our case, after the Defendant moved for summary judgment the third time and lied to you about having new grounds for making the motion; that you claimed Judge Runyon did not overrule the Defendant's motion prior to trial. In fact he did overrule the motion. I attached the journal entry noted as Exhibit 5 to my opposition brief. I have attached it again here. Apparently, in your zeal to dismiss my client's case a second time you overlooked this. We expect to be back for trial, in about 8 months after appeal. At that time, I will ask you to recuse yourself.


M. T. CONWAY

Cc: Opposing Counsel

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Exhibit A

IN THE COURT OF COMMON PLEAS
ASHLAND COUNTY, OHIO

Marlene LEININGER,
Plaintiff,

Case No. 04 CIV 075

Judge RUNYAN

ANNETTE L. SHAW
CLERK OF COURTS
ASHLAND COUNTY, OHIO

2004 NOV 24 AM 11:49

IN

-vs-

PIONEER NATIONAL LATEX,
Defendant.

ORDER DENYING
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT
AND MOTION FOR
RECONSIDERATION

Upon due consideration of the Defendant's motion for summary judgment and all supporting exhibits, and in light of the Plaintiff's opposition briefing and exhibits in support of opposition to the Defendant's motion, after construing all evidence most strongly in the non-moving party's favor; it is the finding of this court that the record shows there is a genuine dispute presented for trial and the Defendant is not entitled to judgment as a matter of law. *See, Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d 134, 144-145 (1997). Summary Judgment Motion denied. With respect to the Defendant's motion for reconsideration, the motion was filed without leave and the issues in the motion were addressed or could have been addressed in the overruled Defendant's motion for summary judgment. In spite of this, the Plaintiff has responded in opposition. The Court finds the Ohio Supreme Court has specifically recognized a cause of action for wrongful termination based upon a public policy against age discrimination in employment, and further finds that Ohio R.C. 4112 *et seq.* is not an exclusive remedy for age discrimination in employment. *See, Livingston v. Hillside Rehabilitation Hospital,*

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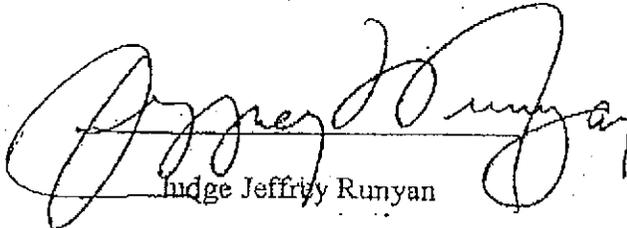
Exhibit B

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IBIT

79 Ohio St. 3d 249 (1997); *Ferraro v. The BF Goodrich Company*, 149 Ohio App. 3d 301, 316 (2002). All of the Defendant's cited case law on reconsideration is distinguishable from the legal issues presented in this case. Motion for reconsideration denied. This case is now set for jury trial pursuant to this Court's separate case management orders.

IT IS SO ORDERED.



Judge Jeffrey Runyan

Date:

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APPENDIX 2

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COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ANNETTE SHAW
CLERK OF COURTS
ASHLAND, OHIO

2006 MAY 26 AM 10:55

FILED APPEALS COURT

MARLENE LEININGER

Plaintiff-Appellant

-vs-

PIONEER NATIONAL LATEX, et al.

Defendant-Appellee

JUDGES:

John W. Wise, P.J.
Julie A. Edwards, J.
John F. Boggins, J.

Case No. 05-COA-048

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal From Ashland County
Common Pleas Court Case 05-CIV-143

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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COREY V. CROGNALE
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00023

Edwards, J.

{¶1} Plaintiff-appellant Marlene Leininger appeals from the October 17, 2005, Amended Opinion and Judgment Entry of the Ashland County Court of Common Pleas granting the Motion for Summary Judgment filed by Defendants-appellees Pioneer National Latex, et al.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Marlene Leininger, who is in her sixties, was employed by appellee Pioneer National Latex as a human resources administrator. On May 25, 2001, appellant was terminated from her employment.

{¶3} Thereafter, on April 29, 2005, appellant filed a complaint against appellee Pioneer National Latex, its plant manager and another employee in the Ashland County Court of Common Pleas. Appellant, in her complaint, set forth a claim of wrongful termination in violation of public policy based on age discrimination. Appellant alleged that "the public policy underpinning the Plaintiff's case is found in R.C. Section 4112.01(A)."

{¶4} Subsequently, appellees filed a Motion for Summary Judgment. Pursuant to an Opinion and Judgment Entry filed on October 14, 2005, the trial court granted appellees' Motion for Summary Judgment, holding that a cause of action for wrongful discharge in violation of public policy based upon age discrimination does not exist under Ohio law. An Amended Opinion and Judgment Entry was filed on October 17, 2005, "to correct certain erroneous findings made by the Court in the original entry regarding prior summary judgment proceedings by the Court in Case No. 04-CIV-075."¹

{¶5} Appellant now raises the following assignments of error on appeal:

¹ The case was a refiled case. The previous case no. was 04-CIV-075.

{¶6} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT AND COMMITTED REVERSIBLE ERROR BY FINDING THAT AS A MATTER OF LAW A CAUSE OF ACTION FOR THE TORT OF WRONGFUL DISCHARGE IN VIOLATION OF OHIO PUBLIC POLICY BASED UPON AGE DISCRIMINATION DOES NOT EXIST UNDER OHIO LAW."

{¶7} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT AND COMMITTED REVERSIBLE ERROR BY GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

{¶8} This matter reaches us upon a grant of summary judgment. Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. Therefore, we must refer to Civ.R. 56(C), which provides the following: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶9} Pursuant to the above rule, a trial court may not enter summary judgment if it appears that a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the nonmoving party has no evidence to prove its case. "[B]are allegations by the moving party are simply not enough." *Vahila v. Hall*, 77 Ohio St.3d 421, 430, 674 N.E.2d 1164, 1997-Ohio-259. The moving party must specifically point to some evidence that demonstrates that the moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the nonmoving party to set forth specific facts demonstrating that there is a genuine issue of material fact for trial. *Id.* at 429, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264, 1996-Ohio-107

{¶10} Furthermore, trial courts should award summary judgment with caution. "Doubts must be resolved in favor of the non-moving party." *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359, 604 N.E.2d 138, 1992-Ohio-95.

{¶11} It is pursuant to this standard that we review appellant's assignments of error.

I

{¶12} Appellant, in her two assignments of error, argues that the trial court erred in holding that a cause of action for the tort of wrongful discharge in violation of Ohio public policy based upon age discrimination does not exist under Ohio law and, on such basis, granting summary judgment to appellees.² We agree.

² Appellant, in her brief, notes that the trial court "specifically declined to address the factual merits of this case and as such, the factual merits and whether or not there is a disputed

{¶13} Pursuant to *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981, a discharged employee has a private cause of action sounding in tort for wrongful discharge where his or her discharge is in contravention of a "sufficiently clear public policy." *Id.* at 233 (Citation omitted). In *Greeley*, the Ohio Supreme Court recognized public policy was "sufficiently clear" where the General Assembly had adopted a specific statute forbidding an employer from discharging or disciplining an employee on the basis of a particular circumstance or occurrence.

{¶14} In order to establish a claim for wrongful termination in violation of Ohio public policy, a plaintiff must demonstrate:

{¶15} "1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).

{¶16} "2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element).

{¶17} "3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element).

{¶18} "4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element)." *Painter v. Graley*, 70 Ohio St.3d 377, 639 N.E.2d 51, 1994-Ohio-334 at fn. 8.

question of fact for trial under Civil Rule 56(C) are not dispositive of this appeal." For such reason, we decline to address whether or not there are genuine issues of material fact even though such issue was raised in appellees' motion for summary judgment. Furthermore, where a trial court declines to consider one argument raised in a motion for summary judgment on the basis of a second argument, the first argument is not properly before the court of appeals. See *Murray v. Grange Mutual Cas. Co.*, Stark App. No. 2003CA0047, 2003-Ohio-3365.

{¶19} The clarity and the jeopardy elements are questions of law and policy to be determined by the court. *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 151, 677 N.E.2d 308, citing *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 70, 652 N.E.2d 653. The causation and overriding justification elements are questions of fact to be determined by the trier of fact. *Id.*

{¶20} The Ohio Supreme Court has addressed the issue of whether an appellant can bring a claim for wrongful discharge in violation of Ohio public policy based on age discrimination.

{¶21} In *Livingston v. Hillside Rehabilitation* (Jan. 24, 1997), Trumbull App. No. 95-T-5360, 1997 WL 51413, the appellant filed a complaint against her former employer alleging that she had been terminated in violation of what is now R.C. 4112.14³ on the basis of her age. Based upon an alleged violation of the same statute, the appellant also brought a common law wrongful discharge tort claim under *Greeley*, supra. After the trial court dismissed the appellant's public policy claim on the basis that her statutory claim provided her with an adequate remedy, the appellant appealed.

{¶22} On appeal, the Eleventh District Court of Appeals affirmed the judgment of the trial court, holding that "as appellant has effective and adequate statutory remedies available to her, appellant cannot avail herself to a common law tort action." *Id.* at 2. The appellant, in *Livingston*, then appealed to the Ohio Supreme Court. On the authority of *Kulch v. Structural Fiber* (1997), 78 Ohio St.3d 1324, 677 N.E.2d 308, the Ohio Supreme Court reversed without opinion the judgment of the court of appeals in *Livingston* and remanded the matter to the trial court. See *Livingston v. Hillside Rehabilitation Hosp.*, 79 Ohio St.3d 249, 680 N.E.2d 1220, 1997-Ohio155. In *Kulch*,

³ R.C. 4112.14 is former R.C. 4101.17.

the Ohio Supreme Court held "R.C. 4113.52 [Ohio Whistleblower's statute] does not preempt a common-law cause of action against an employer who discharges or disciplines an employee in violation of that statute" and "an at-will employee who is discharged or disciplined in violation of R.C. 4113.52 may maintain a statutory cause of action for the violation, a common-law cause of action at tort, or both." *Id* at paragraphs 2 and 5 of the syllabus.

{¶23} The *Livingston* case has been interpreted as permitting claims for wrongful discharge in violation of public policy based on age discrimination. See, for example, *Jones v. Goodyear Tire & Rubber Co.*, Summit App. No. 21724, 2004-Ohio-2821, 2004 WL 1197209; *Ferraro v. B.F. Goodrich Co.*, 149 Ohio App.3d 301, 777 N.E.2d 282, 2002-Ohio-4398; and *Ziegler v. IBP Hog Market, Inc.* (C.A.6, 2001), 249 F.3d 509, 519, fn. 10. See also *Mercurio v. Honeywell* (S.D. Ohio, March 5, 2003), 2003 WL 966287.

{¶24} We are cognizant of the fact that the Ohio Supreme Court, in *Wiles v. Medina Auto Parts*, 96 Ohio St. 3d 240, 773 N.E.2d 526, 2002-Ohio-3994, held that an employee could not bring a common law action for wrongful discharge in violation of public policy upon his employer's violation of the Family and Medical Leave Act (FMLA).⁴ The Ohio Supreme Court, in so holding, held, in part, as follows:

{¶25} "[W]e next turn to the jeopardy element to determine whether an employer's dismissal of an employee under the circumstances alleged by *Wiles* would jeopardize the public policy set forth in the FMLA. In other words, we must assess whether the absence of a cognizable *Greeley* claim based solely on a violation of the FMLA would seriously compromise the Act's statutory objectives by deterring eligible employees from exercising their substantive leave rights. See *Kulch v. Structural Fibers*,

⁴ Section 2601 et seq., Title 29, U.S.Code.

Ashtland County App. Case No. 05-CCA-040

Inc. (1997), 78 Ohio St.3d 134, 154, 677 N.E.2d 308; see, also, 2 Perritt at 42-43, Section 7.17. It is here that Wiles's claim fails.

{¶26} "An analysis of the jeopardy element necessarily involves inquiring into the existence of any alternative means of promoting the particular public policy to be vindicated by a common-law wrongful-discharge claim. *Id.* at 44, Section 7.17. Where, as here, the sole source of the public policy opposing the discharge is a statute that provides the substantive right and remedies for its breach, "the issue of adequacy of remedies" becomes a particularly important component of the jeopardy analysis. See *Collins*, 73 Ohio St.3d at 73, 652 N.E.2d 653. "If the statute that establishes the public policy contains its own remedies, it is less likely that tort liability is necessary to prevent dismissals from interfering with realizing the statutory policy." 2 Perritt at 71, Section 7.26. Simply put, there is no need to recognize a common-law action for wrongful discharge if there already exists a statutory remedy that adequately protects society's interests." *Wiles*, *supra.* at paragraphs 14-15.

{¶27} However, the *Wiles* decision was a plurality (4-to-3) decision rather than a clear majority opinion and concerned the FMLA.⁵ Moreover, the Ohio Supreme Court, in *Wiles*, did not expressly overrule *Livingston*, *supra.* Furthermore, the Ohio Supreme Court has yet to apply its reasoning in *Wiles* to wrongful discharge claims based on R.C. Chapter 4112.

{¶28} Based on the foregoing, we find that the trial court erred in holding that a cause of action for wrongful discharge in violation of public policy based upon age discrimination does not exist under Ohio law.

⁵ In *Wiles*, Judge Pfeifer concurred in judgment only.

Ashtabula County App. Case No. 03-00A-040 9

{¶29} Appellees, in their brief, contend that appellant's public policy claim was properly dismissed because she did not meet the procedural requirements for filing an age discrimination claim pursuant to R.C. 4112.02(A). Appellees note that appellant's claim is premised upon the prohibition against age discrimination contained in such statute and note that "[i]t is undisputed that such age discrimination claims must be commenced within 180 days of the adverse employment action."

{¶30} In *Pytlinski v. Brocar Products*, 94 Ohio St. 3d 77, 760 N.E.2d 385, 2002-Ohio-66, an employee filed a complaint against his employer alleging that he was terminated in violation of the Ohio public policy favoring workplace safety. The appellees sought dismissal of the employee's complaint on the basis that it was barred by the one-hundred-eighty (180) day limitations period set forth in R.C. 4113.52, the Ohio Whistleblower Act. After the trial court granted the motion to dismiss, the employee appealed.

{¶31} On appeal, the appellees argued that the Ohio Supreme Court should apply the holding of *Contreras v. Ferro Corp.* (1995), 73 Ohio St. 3d 244, 652 N.E.2d 940. In *Contreras*, the Ohio Supreme Court held as follows in the syllabus: "In order for an employee to be afforded protection as a 'whistleblower,' such employee must strictly comply with the dictates of R.C. 4113.52." The appellees noted that the employee did not comply with the one-hundred-eighty (180) day limitations period in R.C. 4113.52.

{¶32} However, the Ohio Supreme Court, in *Pytlinski*, held, in relevant part, as follows: "Subsequent to our decision in *Contreras*, we held that an at-will employee who is discharged for filing a complaint with OSHA alleging concerns with workplace safety is entitled to maintain a common-law tort action based upon *Greeley*. *Kulch v.*

Ashland County App. Case No. 00-037A-040 10
Structural Fibers, Inc. (1997), 78 Ohio St.3d 134, 677 N.E.2d 308, paragraph one of the syllabus. In *Kulch*, the plaintiff was discharged after he filed complaints with OSHA regarding health problems that he and other employees were experiencing in the workplace. After being discharged, the plaintiff brought suit against the employer, alleging both a whistleblower claim, pursuant to R.C. 4113.52, and a claim for wrongful discharge in violation of public policy....

{¶33} " We find the holding in *Kulch* controlling in this case. Ohio public policy favoring workplace safety is an independent basis upon which a cause of action for wrongful discharge in violation of public policy may be prosecuted. (Emphasis added). Therefore, *Pytlinski* is not bound by the statute of limitations set forth in R.C. 4113.52 because his cause of action is not based upon that statute, but is, instead, based in common law for violation of public policy." Id at 79-80. On such basis, the Ohio Supreme Court, in *Pytlinski*, held that the one-hundred-eighty-day limitations period set forth in R.C. 4113.52 did not apply.

{¶34} Likewise, in the case sub judice, appellant's cause of action is not based upon a statute, but rather is based in common law. Appellant, therefore, was not required to comply with the one-hundred-eighty day statute of limitations in R.C. 4112.02(A).

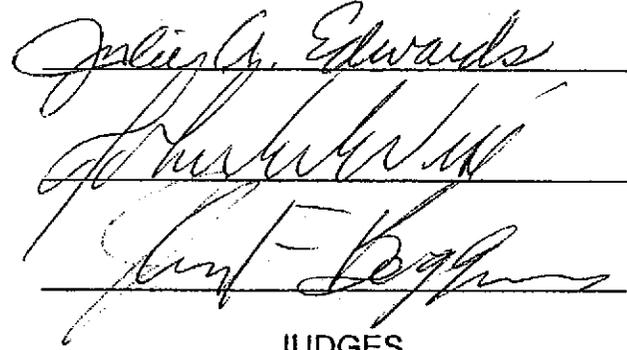
{¶35} For the foregoing reasons, appellant's two assignments of error are sustained.

{¶36} Accordingly, the judgment of the Ashland County Court of Common Pleas is reversed and this matter is remanded for further proceedings.

By: Edwards, J.

Wise, P.J. and

Boggins, J. concur



JUDGES

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00033

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ANNETTE SHAW
CLERK OF COURTS
ASHLAND, OHIO

2006 MAY 26 AM 10:55

FILED APPEALS COURT

MARLENE LEININGER

Plaintiff-Appellant

-vs-

PIONEER NATIONAL LATEX, et al.

Defendant-Appellee

JUDGMENT ENTRY

CASE NO. 05-COA-048

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Ashland County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings. Costs assessed to appellant.

Judith A. Edwards
Robert W. Williams
Scott E. Boggs

JUDGES

00034

JM # CA-1

APPENDIX 3

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DONNA M. LEONARDI, Plaintiff-Appellant

v.

LAWRENCE INDUSTRIES, INC., ET AL., Defendants-Appellees

CASE NO. 72313.

8th District Court of Appeals of Ohio, Cuyahoga County.

Decided on September 4, 1997.

CIVIL APPEAL FROM THE COMMON PLEAS COURT CASE NO. CV-306343.

For Plaintiff-Appellant: FRANK CONSOLO (#0042455), MAYWOOD CENTER - SUITE 107, 4568 MAYFIELD ROAD, CLEVELAND, OHIO 44121-4049.

For Defendants-Appellees: JEFFREY M. EMBLETON (#0006480), JOHN F. BURKE, III (#0059974), MANSOUR, GAVIN, GERLACK & MANOS CO., LPA, 55 PUBLIC SQUARE, SUITE 2150, CLEVELAND, OHIO 44113-1994.

OPINION

PER CURIAM

Plaintiff-appellant Donna M. Leonardi ("appellant") appeals from the dismissal pursuant to Civ.R. 12(b) of her amended complaint in which she alleged defendants-appellees Lawrence Industries, Inc. and Larry Kopittke ("Lawrence") wrongfully discharged her from her employment due to age discrimination.

Appellant assigns the following errors for review:

I.

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT ON THE GROUND THAT PLAINTIFF'S FIRST CAUSE OF ACTION BY INTENTIONAL AGE DISCRIMINATION IN VIOLATION OF SECTION 4112.14 OF THE OHIO REVISED CODE WAS NOT TIMELY FILED. (JOURNAL ENTRY VOL. 2057, PG. 241).

II.

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT ON THE GROUND THAT PLAINTIFF'S SECOND CAUSE OF ACTION FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY WAS NOT TIMELY FILED. (JOURNAL ENTRY VOL. 2057, PG.241).

III.

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT ON THE GROUND THAT PLAINTIFF'S THIRD AND FOURTH CAUSE OF ACTION FOR INTENTIONAL AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS WERE NOT TIMELY FILED.

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Finding the first and second assignments of error to have merit, the judgment of the trial court is affirmed in part and reversed in part.

On April 5, 1996, appellant filed a complaint against Lawrence in which she alleged Lawrence intentionally discriminated against appellant when Lawrence terminated her employment with the company in violation of R.C. 4112.14 or R.C. 4112.99. Appellant also brought causes of action for negligent and intentional infliction of emotional distress.

In her complaint, appellant averred she was employed as a grinding machine operator at Lawrence from September 25, 1989, until her discharge on April 14, 1995. Appellant maintained she performed her duties as a grinding machine operator competently, efficiently, and satisfactorily while employed by Lawrence. Appellant alleged Kopittke told her she had to retire because she was too old to continue working. Although appellant refused to retire, Kopittke stated appellant was considered retired effective immediately. Appellant averred that since her discharge, she had been severely depressed and emotionally and physically harmed, causing her to receive medical attention and be placed on medications.

On May 15, 1996, appellant filed an amended complaint in which she added a claim of wrongful discharge in violation of public policy due to age discrimination. Lawrence responded to appellant's claims by filing a motion to dismiss. Lawrence argued appellant's suit was not filed in a timely manner. Lawrence maintained that under R.C. Chapter 4112, the statute of limitations was one-hundred-eighty days for a claim of age discrimination. As appellant's complaint was filed nearly one year after her discharge, Lawrence asserted her amended complaint should be dismissed as it was barred by the statute of limitations.

Appellant responded that her statutory claim of age discrimination was timely as the six-year statute of limitations of R.C. 2305.07 applied. Appellant argued her claim for wrongful discharge in violation of public policy was based on an exception to the employment-at-will doctrine and was not statutorily based. Appellant's two other claims were for negligent and intentional infliction of emotional distress and, therefore, the one-hundred-eighty day statute of limitations of R.C. 4112.02(N) was inapplicable.

Lawrence responded to appellant's arguments by reiterating its contention that the one-hundred-eighty day statute of limitations of R.C. 4112.02(N) did govern appellant's first cause of action brought pursuant to R.C. 4112.14. Lawrence asserted appellant's claim for wrongful discharge in violation of public policy was in conflict with the statutory relief provided by R.C. Chapter 4112. Therefore, a common-law cause of action for age discrimination failed to state a claim for which relief could be granted. Lawrence asked the trial court to dismiss appellant's intentional emotional distress claim as appellant's complaint did not allege conduct by Lawrence which was extreme or outrageous as to be beyond all possible bounds of decency. Lawrence also pointed out that Ohio does not recognize a separate tort for the negligent infliction of emotional distress in an employment situation.

The trial court granted Lawrence's motion to dismiss. Appellant has appealed from that ruling.

II.

In her first assignment of error, appellant contends the trial court erred by granting Lawrence's motion to dismiss appellant's cause of action for intentional age discrimination brought under R.C. 4112.14. In its motion to dismiss, Lawrence argued the claim was not brought within the statutory limit of one-hundred-eighty days. Appellant asserts this is not the correct statute of limitations to apply but that the six-year period of R.C. 2305.07 governs her cause of action for age discrimination in violation

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In order to grant a dismissal pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts entitling him to relief. O'Brien v. University Community Tenants Union (1975), 42 Ohio St.2d 242, 245. All factual allegations stated in the complaint must be presumed to be true and all reasonable inferences in favor of the nonmoving party be made. Mitchell v. Lawson Milk Co. (1988), 40 Ohio St.3d 190. A plaintiff is not required to prove his case at the pleading stage. The trial court may not grant a motion to dismiss if there is a set of facts consistent with the complaint which would allow the plaintiff to recover. York v. Ohio State Highway Patrol (1991), 60 Ohio St.3d 143, 145. In assessing a trial court's dismissal of a complaint, a reviewing court examines only the allegations of the complaint. Assuming those allegations to be true, the dismissal is affirmed only if no set of facts exists which would entitle the plaintiff to relief under the allegations of the complaint. Rogers v. Targot Telemarketing Services (1990), 70 Ohio App.3d 689.

Appellant brought her statutory claim of age discrimination under R.C. 4112.14. This statute was formally R.C. 4101.17 which was recodified as part of Chapter 4112 of the Revised Code effective October 29, 1995. In Morris v. Kaiser Engineers, Inc. (1984), 14 Ohio St.3d 45, the court held that the applicable statute of limitations for the then R.C. 4101.17 was the six-year period contained in R.C. 2305.07. Id., syllabus. Appellant argues Morris still controls R.C. 4112.14 and she had six years within to file her complaint.

Lawrence relies on Bellian v. Bicron Corp. (1994), 69 Ohio St.3d 517, which held that any age discrimination claim which is premised on a violation described in R.C. Chapter 4112 must comply with the one-hundred-eighty day statute of limitations of R.C. 4112.02(N). In Bellian, the plaintiff filed his claim under R.C. 4112.99 which provides that anyone violating this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief. At that time, the only provision of R.C. Chapter 4112 directly governing age discrimination claims was R.C. 4112.02(N) which provided for a one-hundred-eighty day statute of limitations for an age discrimination claim. Because this was the only provision in R.C. Chapter 4112 recognizing discrimination on the basis of age, the court reasoned the plaintiff had to be basing his claim on an age discrimination claim as identified in R.C. 4112.02.

Lawrence argues that, once R.C. 4101.17 became a part of R.C. Chapter 4112 as R.C. 4112.14, it was subject to the holding of Bellian. There is no statute of limitations set forth in R.C. 4112.14 and, therefore, according to Lawrence, any claims brought under that provision became subject to the more specific statute governing age discrimination, which is R.C. 4112.02(N). Lawrence contends the legislature must have intended this result when it recodified the provision as a part of R.C. Chapter 4112 as both statutes governing age discrimination claims under that R.C. Chapter would have the same statute of limitations.

R.C. 4112.02(A) declares it to be an unlawful discriminatory practice for an employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge that person without just cause, to refuse to hire, or to discriminate against that person in matters related to employment. R.C. 4112.02(N) provides that an individual discriminated against on the basis of age may institute a civil action within one-hundred-eighty days after the alleged unlawful discriminatory practice. Anyone filing under this provision is barred from instituting an action under R.C. 4112.14 or from filing a charge with the Ohio Civil Rights Commission. A plaintiff must choose which remedy to pursue as the remedies are exclusive. See Morris, *supra*.

As the remedies are exclusive, it seems unlikely the legislature intended for the same statute of limitations to apply to both R.C. 4112.14 and R.C. 4112.02(N) simply as a result of the recodification of

00038

one of the remedies. Support for this position is found in the subsequent action taken by the legislature with regard to R.C. 4112.14. Effective January 27, 1997, R.C. 4112.14 was changed to include a two-year statute of limitations. Clearly, the legislature did not intend for the two remedies for age discrimination claims now found in R.C. Chapter 4112 to have the same statute of limitations.

Appellant's claim arose before this new modification of R.C. 4112.14 yet after R.C. 4101.17 was recodified. Although the provision became a part of R.C. Chapter 4112, the holding of Morris permitting a six-year statute of limitations was applicable to appellant's claim. The trial court erred by dismissing appellant's cause of action for age discrimination brought pursuant to R.C. 4112.14 as being untimely.

Appellant's first assignment of error is well-taken.

III.

Appellant's second assignment of error addresses whether her cause of action for wrongful discharge in violation of public policy was timely filed. Appellant asserts the applicable statute of limitations is the four-year time period provided for in R.C. 2305.09(D). Lawrence seeks to apply the one-hundred-eighty day statutory period of R.C. 4112.02(N).

In Painter v. Graley (1992), 84 Ohio App.3d 65, this court held that the four-year statute of limitations found in R.C. 2305.09(D) applied to actions for tortious wrongful discharge. Therefore, appellant had four years within which to file her claim against Lawrence for wrongful discharge in violation of public policy. Appellant's cause of action for this tort should not have been dismissed as being untimely filed.

The second issue raised in this assignment of error is whether Ohio recognizes a public policy exception to the employment-at-will doctrine for a claim of age discrimination. In Greeley v. Miami Valley Maintenance Contrs., Inc. (1990), 49 Ohio St.3d 228, the court carved out the public policy exception to the employment-at-will doctrine. That exception was limited to a discharge which was prohibited by statute. However, the exception was broadened in Painter v. Graley (1994), 70 Ohio St.3d 377, when a Greeley claim was held to include not only statutory enactments but also could be discerned from other sources such as the Ohio and United States Constitutions, administrative rules and regulations and the common law.

The latest pronouncement on the subject by the Supreme Court of Ohio is set forth in Kulch v. Structural Fibers, Inc. (1997), 78 Ohio St.3d 134. In Kulch, the court reaffirmed the analysis of these claims which was set forth in Painter, supra. That analysis is as follows:

1. That [a] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).
2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element).
3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element).
4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

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Id. p. 151, quoting H. Perritt, "The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?" (1989), 58 U.Cin.L.Rev.397, 398-399. The clarity and jeopardy elements of the tort of wrongful discharge are questions of law while the elements of causation and overriding justification are questions of fact. Id. Claims brought pursuant to Greeley and the subsequent cases addressing this exception to the employment-at-will doctrine are intended to bolster the public policy of Ohio and to advance the rights of employees who are discharged or disciplined in contravention of clear public policy. Id. at 155. The Kulch court stated that the employment-at-will doctrine was judicially created and could be judicially abolished. The courts have the responsibility for determining whether a sufficient public policy exception exists which supports a common-law exception to the employment-at-will doctrine. Id. at 161.

Whether a claim for wrongful discharge based upon R.C. 4112.14 for age discrimination exists apparently has been decided in Livingston v. Hillside Rehab. Hosp. (1997), 79 Ohio St.3d 249, in which the Supreme Court reversed the Eleventh District Court of Appeals which had held that no public policy exception to a claim brought pursuant to R.C. 4101.17 (now R.C. 4112.14) existed as the statute provided a complete remedy to the plaintiff. The Supreme Court reversed without opinion on the authority of Kulch. Based on Livingston, appellant may maintain a claim for wrongful discharge for age discrimination in violation of public policy.

Appellant's second assignment of error has merit.

IV.

In appellant's third assignment of error, she argues the trial court erred in dismissing her causes of action for intentional and negligent infliction of emotional distress because in its motion to dismiss, Lawrence only argued the claims were untimely. Appellant asserts the intentional and negligent infliction of emotional distress claims were governed by the four-year statute of limitations set forth in R.C. 2305.09(D). Therefore, these causes of action were timely and should not have been dismissed.

Although in its Civ.R. 12(B) motion to dismiss, Lawrence did argue appellant's emotional distress claims were untimely, in its reply to appellant's brief in opposition to motion to dismiss, Lawrence argued appellant had failed to attribute actions to Lawrence which amounted to conduct sufficient to show an intentional infliction of emotional distress. Lawrence further argued that no cause of action for negligent infliction of emotional distress is recognized in the area of employment.

Although appellant's contention that these claims were filed within the statutory time limit is correct, Lawrence presented other arguments for the trial court's consideration on this issue. Appellant's assignment of error will be reviewed not on whether her causes of action for infliction of emotional distress were timely but on whether appellant's claims could withstand a motion to dismiss based on the allegations set forth in appellant's amended complaint.

In Tschantz v. Ferguson (1994), 97 Ohio App.3d 693, this court held that Ohio does not recognize a separate tort for negligent infliction of emotional distress in the employment context. A plaintiff can recover for the negligent infliction of emotional harm only by instituting a "traditional" claim for negligent infliction of emotional harm. A plaintiff must show that he or she was a bystander to an accident, reasonably appreciated the peril, and suffered serious and foreseeable emotional distress as a result of his or her cognizance or fear of the peril. Id. at 714. This position has been affirmed by the Supreme Court of Ohio in Kulch, supra, at 163. Appellant's amended complaint alleges no facts which would permit recovery for negligent infliction of emotional distress under Tschantz.

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A claim for intentional infliction of emotional distress requires proof of the following elements: (1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff, (2) that the actor's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community, (3) that the actor's actions were the proximate cause of the plaintiff's psychic injury, and (4) that the mental anguish suffered by the plaintiff is serious and of a nature that no reasonable person could be expected to endure it. Ashcroft v. Mt. Sinai Medical Ctr. (1990), 68 Ohio App.3d 359. Serious emotional distress requires an emotional injury which is both severe and debilitating. Paugh v. Hanks (1983), 6 Ohio St.3d 72. Yeager v. Local Union 20 (1983), 6 Ohio St.3d 369, relied on the description of extreme and outrageous conduct found in Restatement of the Law 2d, Torts (1965) 71, Section 46, which stated:

* * * It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

Id., at 374-375.

In her amended complaint, appellant alleged Kopittke told appellant she must retire because she was too old to continue working. When appellant refused, Kopittke stated appellant was considered to be retired immediately. There is nothing in this description of events which reflects behavior or conduct by Lawrence which was so extreme as to go beyond all possible bounds of decency or which would be considered as utterly intolerable in a civilized community. Even when viewing appellant's allegations in the light most favorable to her, the conduct is not such that the average member of the community would regard the events as outrageous.

Appellant's third assignment of error lacks merit.

Judgment affirmed in part and reversed in part and remanded.

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APPENDIX 4

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§ 1.12. Special provision governs unless cumulative.

When a special provision is made in a remedial law as to service, pleadings, competency of witnesses, or in any other respect inconsistent with the general provisions of sections of the Revised Code relating to procedure in the court of common pleas and procedure on appeal, the special provision shall govern, unless it appears that the provisions are cumulative.

HISTORY: RS § 4956; GC § 10222; Bureau of Code Revision. Eff 10-1-53.

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APPENDIX 5

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§ 1.51. Special or local provision prevails over general; exception.

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

HISTORY: 134 v H 607. Eff 1-3-72.

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APPENDIX 6

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§ 4112.02. Unlawful discriminatory practices.

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(B) For an employment agency or personnel placement service, because of race, color, religion, sex, national origin, disability, age, or ancestry, to do any of the following:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person;

(2) Comply with a request from an employer for referral of applicants for employment if the request directly or indirectly indicates that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to do any of the following:

(1) Limit or classify its membership on the basis of race, color, religion, sex, national origin, disability, age, or ancestry;

(2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, national origin, disability, age, or ancestry.

(D) For any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, national origin, disability, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, personnel placement service, or labor organization, prior to employment or admission to membership, to do any of the following:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, national origin, disability, age, or ancestry of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, sex, national origin, disability, age, or ancestry of any applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank, seeking to elicit information regarding race, color, religion, sex, national origin, disability, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency of that government, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain that proof in the employer's personnel records and may use photographic or fingerprint identification for security

00047

purposes;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, national origin, disability, age, or ancestry;

(5) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, national origin, disability, age, or ancestry of that group;

(6) Utilize in the recruitment or hiring of persons any employment agency, personnel placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, national origin, disability, age, or ancestry.

(F) For any person seeking employment to publish or cause to be published any advertisement that specifies or in any manner indicates that person's race, color, religion, sex, national origin, disability, age, or ancestry, or expresses a limitation or preference as to the race, color, religion, sex, national origin, disability, age, or ancestry of any prospective employer.

(G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

(H) For any person to do any of the following:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, familial status, ancestry, disability, or national origin;

(2) Represent to any person that housing accommodations are not available for inspection, sale, or rental, when in fact they are available, because of race, color, religion, sex, familial status, ancestry, disability, or national origin;

(3) Discriminate against any person in the making or purchasing of loans or the provision of other financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, or any person in the making or purchasing of loans or the provision of other financial assistance that is secured by residential real estate, because of race, color, religion, sex, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located, provided that the person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to the person's principal business and not only as a part of the purchase price of an owner-occupied residence the person is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing accommodations or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations, including the sale of fire, extended coverage, or homeowners insurance, because of race, color, religion, sex, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

00048

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations because of race, color, religion, sex, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member of a married couple;

(7) Print, publish, or circulate any statement or advertisement, or make or cause to be made any statement or advertisement, relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing accommodations, or relating to the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, that indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, familial status, ancestry, disability, or national origin, or an intention to make any such preference, limitation, specification, or discrimination;

(8) Except as otherwise provided in division (H)(8) or (17) of this section, make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, familial status, ancestry, disability, or national origin in connection with the sale or lease of any housing accommodations or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations. Any person may make inquiries, and make and keep records, concerning race, color, religion, sex, familial status, ancestry, disability, or national origin for the purpose of monitoring compliance with this chapter.

(9) Include in any transfer, rental, or lease of housing accommodations any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant;

(10) Induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, familial status, or ethnic composition of the block, neighborhood, or other area in which the housing accommodations are located, or induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that the presence or anticipated presence of persons of any race, color, religion, sex, familial status, ancestry, disability, or national origin, in the block, neighborhood, or other area will or may have results including, but not limited to, the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, familial status, or ethnic composition of the block, neighborhood, or other area;

(c) An increase in criminal or antisocial behavior in the block, neighborhood, or other area;

(d) A decline in the quality of the schools serving the block, neighborhood, or other area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or discriminate against any person in the terms or conditions of that access, membership, or participation, on account of race, color, religion, sex, familial status, national origin, disability, or ancestry;

00049

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (H) of this section;

(13) Discourage or attempt to discourage the purchase by a prospective purchaser of housing accommodations, by representing that any block, neighborhood, or other area has undergone or might undergo a change with respect to its religious, racial, sexual, familial status, or ethnic composition;

(14) Refuse to sell, transfer, assign, rent, lease, sublease, or finance, or otherwise deny or withhold, a burial lot from any person because of the race, color, sex, familial status, age, ancestry, disability, or national origin of any prospective owner or user of the lot;

(15) Discriminate in the sale or rental of, or otherwise make unavailable or deny, housing accommodations to any buyer or renter because of a disability of any of the following:

(a) The buyer or renter;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(15)(b) of this section.

(16) Discriminate in the terms, conditions, or privileges of the sale or rental of housing accommodations to any person or in the provision of services or facilities to any person in connection with the housing accommodations because of a disability of any of the following:

(a) That person;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(16)(b) of this section.

(17) Except as otherwise provided in division (H)(17) of this section, make an inquiry to determine whether an applicant for the sale or rental of housing accommodations, a person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available, or any individual associated with that person has a disability, or make an inquiry to determine the nature or severity of a disability of the applicant or such a person or individual. The following inquiries may be made of all applicants for the sale or rental of housing accommodations, regardless of whether they have disabilities:

(a) An inquiry into an applicant's ability to meet the requirements of ownership or tenancy;

(b) An inquiry to determine whether an applicant is qualified for housing accommodations available only to persons with disabilities or persons with a particular type of disability;

(c) An inquiry to determine whether an applicant is qualified for a priority available to persons with disabilities or persons with a particular type of disability;

(d) An inquiry to determine whether an applicant currently uses a controlled substance in violation of section 2925.11 of the Revised Code or a substantively comparable municipal ordinance;

(e) An inquiry to determine whether an applicant at any time has been convicted of or pleaded guilty to

00050

any offense, an element of which is the illegal sale, offer to sell, cultivation, manufacture, other production, shipment, transportation, delivery, or other distribution of a controlled substance.

(18) (a) Refuse to permit, at the expense of a person with a disability, reasonable modifications of existing housing accommodations that are occupied or to be occupied by the person with a disability, if the modifications may be necessary to afford the person with a disability full enjoyment of the housing accommodations. This division does not preclude a landlord of housing accommodations that are rented or to be rented to a disabled tenant from conditioning permission for a proposed modification upon the disabled tenant's doing one or more of the following:

(i) Providing a reasonable description of the proposed modification and reasonable assurances that the proposed modification will be made in a workerlike manner and that any required building permits will be obtained prior to the commencement of the proposed modification;

(ii) Agreeing to restore at the end of the tenancy the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if it is reasonable for the landlord to condition permission for the proposed modification upon the agreement;

(iii) Paying into an interest-bearing escrow account that is in the landlord's name, over a reasonable period of time, a reasonable amount of money not to exceed the projected costs at the end of the tenancy of the restoration of the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if the landlord finds the account reasonably necessary to ensure the availability of funds for the restoration work. The interest earned in connection with an escrow account described in this division shall accrue to the benefit of the disabled tenant who makes payments into the account.

(b) A landlord shall not condition permission for a proposed modification upon a disabled tenant's payment of a security deposit that exceeds the customarily required security deposit of all tenants of the particular housing accommodations.

(19) Refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit, including associated public and common use areas;

(20) Fail to comply with the standards and rules adopted under division (A) of section 3781.111 [3781.11.1] of the Revised Code;

(21) Discriminate against any person in the selling, brokering, or appraising of real property because of race, color, religion, sex, familial status, ancestry, disability, or national origin;

(22) Fail to design and construct covered multifamily dwellings for first occupancy on or after June 30, 1992, in accordance with the following conditions:

(a) The dwellings shall have at least one building entrance on an accessible route, unless it is impractical to do so because of the terrain or unusual characteristics of the site.

(b) With respect to dwellings that have a building entrance on an accessible route, all of the following apply:

(i) The public use areas and common use areas of the dwellings shall be readily accessible to and usable by persons with a disability.

00051

(ii) All the doors designed to allow passage into and within all premises shall be sufficiently wide to allow passage by persons with a disability who are in wheelchairs.

(iii) All premises within covered multifamily dwelling units shall contain an accessible route into and through the dwelling; all light switches, electrical outlets, thermostats, and other environmental controls within such units shall be in accessible locations; the bathroom walls within such units shall contain reinforcements to allow later installation of grab bars; and the kitchens and bathrooms within such units shall be designed and constructed in a manner that enables an individual in a wheelchair to maneuver about such rooms.

For purposes of division (H)(22) of this section, "covered multifamily dwellings" means buildings consisting of four or more units if such buildings have one or more elevators and ground floor units in other buildings consisting of four or more units.

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

(J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(K) (1) Nothing in division (H) of this section shall bar any religious or denominational institution or organization, or any nonprofit charitable or educational organization that is operated, supervised, or controlled by or in connection with a religious organization, from limiting the sale, rental, or occupancy of housing accommodations that it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference in the sale, rental, or occupancy of such housing accommodations to persons of the same religion, unless membership in the religion is restricted on account of race, color, or national origin.

(2) Nothing in division (H) of this section shall bar any bona fide private or fraternal organization that, incidental to its primary purpose, owns or operates lodgings for other than a commercial purpose, from limiting the rental or occupancy of the lodgings to its members or from giving preference to its members.

(3) Nothing in division (H) of this section limits the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations. Nothing in that division prohibits the owners or managers of housing accommodations from implementing reasonable occupancy standards based on the number and size of sleeping areas or bedrooms and the overall size of a dwelling unit, provided that the standards are not implemented to circumvent the purposes of this chapter and are formulated, implemented, and interpreted in a manner consistent with this chapter and any applicable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations.

(4) Nothing in division (H) of this section requires that housing accommodations be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(5) Nothing in division (H) of this section pertaining to discrimination on the basis of familial status shall be construed to apply to any of the following:

00052

(a) Housing accommodations provided under any state or federal program that have been determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended, to be specifically designed and operated to assist elderly persons;

(b) Housing accommodations intended for and solely occupied by persons who are sixty-two years of age or older;

(c) Housing accommodations intended and operated for occupancy by at least one person who is fifty-five years of age or older per unit, as determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended.

(L) Nothing in divisions (A) to (E) of this section shall be construed to require a person with a disability to be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the person with a disability, other employees, the general public, or the facilities in which the work is to be performed, or to require the employment or training of a person with a disability in a job that requires the person with a disability routinely to undertake any task, the performance of which is substantially and inherently impaired by the person's disability.

(M) Nothing in divisions (H)(1) to (18) of this section shall be construed to require any person selling or renting property to modify the property in any way or to exercise a higher degree of care for a person with a disability, to relieve any person with a disability of any obligation generally imposed on all persons regardless of disability in a written lease, rental agreement, or contract of purchase or sale, or to forbid distinctions based on the inability to fulfill the terms and conditions, including financial obligations, of the lease, agreement, or contract.

(N) An aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty days after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights.

A person who files a civil action under this division is barred, with respect to the practices complained of, from instituting a civil action under section 4112.14 of the Revised Code and from filing a charge with the commission under section 4112.05 of the Revised Code.

(O) With regard to age, it shall not be an unlawful discriminatory practice and it shall not constitute a violation of division (A) of section 4112.14 of the Revised Code for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation that may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, including, but not limited to, a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of this section. However, no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual, because of the individual's age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 623, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 623, as amended.

00053

(3) Retire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, of the employer of the employee, which equals, in the aggregate, at least forty-four thousand dollars, in accordance with the conditions of the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 631, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 631, as amended;

(4) Observe the terms of any bona fide apprenticeship program if the program is registered with the Ohio apprenticeship council pursuant to sections 4139.01 to 4139.06 of the Revised Code and is approved by the federal committee on apprenticeship of the United States department of labor.

(P) Nothing in this chapter prohibiting age discrimination and nothing in division (A) of section 4112.14 of the Revised Code shall be construed to prohibit the following:

(1) The designation of uniform age the attainment of which is necessary for public employees to receive pension or other retirement benefits pursuant to Chapter 145., 742., 3307., 3309., or 5505. of the Revised Code;

(2) The mandatory retirement of uniformed patrol officers of the state highway patrol as provided in section 5505.16 of the Revised Code;

(3) The maximum age requirements for appointment as a patrol officer in the state highway patrol established by section 5503.01 of the Revised Code;

(4) The maximum age requirements established for original appointment to a police department or fire department in sections 124.41 and 124.42 of the Revised Code;

(5) Any maximum age not in conflict with federal law that may be established by a municipal charter, municipal ordinance, or resolution of a board of township trustees for original appointment as a police officer or firefighter;

(6) Any mandatory retirement provision not in conflict with federal law of a municipal charter, municipal ordinance, or resolution of a board of township trustees pertaining to police officers and firefighters;

(7) Until January 1, 1994, the mandatory retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure, at an institution of higher education as defined in the "Education Amendments of 1980," 94 Stat. 1503, 20 U.S.C.A. 1141(a).

(Q) (1) (a) Except as provided in division (Q)(1)(b) of this section, for purposes of divisions (A) to (E) of this section, a disability does not include any physiological disorder or condition, mental or psychological disorder, or disease or condition caused by an illegal use of any controlled substance by an employee, applicant, or other person, if an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee acts on the basis of that illegal use.

(b) Division (Q)(1)(a) of this section does not apply to an employee, applicant, or other person who satisfies any of the following:

(i) The employee, applicant, or other person has successfully completed a supervised drug rehabilitation

00054

program and no longer is engaging in the illegal use of any controlled substance, or the employee, applicant, or other person otherwise successfully has been rehabilitated and no longer is engaging in that illegal use.

(ii) The employee, applicant, or other person is participating in a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance.

(iii) The employee, applicant, or other person is erroneously regarded as engaging in the illegal use of any controlled substance, but the employee, applicant, or other person is not engaging in that illegal use.

(2) Divisions (A) to (E) of this section do not prohibit an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee from doing any of the following:

(a) Adopting or administering reasonable policies or procedures, including, but not limited to, testing for the illegal use of any controlled substance, that are designed to ensure that an individual described in division (Q)(1)(b)(i) or (ii) of this section no longer is engaging in the illegal use of any controlled substance;

(b) Prohibiting the illegal use of controlled substances and the use of alcohol at the workplace by all employees;

(c) Requiring that employees not be under the influence of alcohol or not be engaged in the illegal use of any controlled substance at the workplace;

(d) Requiring that employees behave in conformance with the requirements established under "The Drug-Free Workplace Act of 1988," 102 Stat. 4304, 41 U.S.C.A. 701, as amended;

(e) Holding an employee who engages in the illegal use of any controlled substance or who is an alcoholic to the same qualification standards for employment or job performance, and the same behavior, to which the employer, employment agency, personnel placement service, labor organization, or joint labor-management committee holds other employees, even if any unsatisfactory performance or behavior is related to an employee's illegal use of a controlled substance or alcoholism;

(f) Exercising other authority recognized in the "Americans with Disabilities Act of 1990," 104 Stat. 327, 42 U.S.C.A. 12101, as amended, including, but not limited to, requiring employees to comply with any applicable federal standards.

(3) For purposes of this chapter, a test to determine the illegal use of any controlled substance does not include a medical examination.

(4) Division (Q) of this section does not encourage, prohibit, or authorize, and shall not be construed as encouraging, prohibiting, or authorizing, the conduct of testing for the illegal use of any controlled substance by employees, applicants, or other persons, or the making of employment decisions based on the results of that type of testing.

HISTORY: 128 v 12 (Eff 7-29-59); 129 v 1694 (Eff 10-24-61); 131 v 982 (Eff 10-30-65); 133 v H 47 (Eff 10-24-69); 133 v H 432 (Eff 11-12-69); 135 v H 610 (Eff 12-19-73); 136 v H 151 (Eff 1-14-76); 136 v S 162 (Eff 7-23-76); 138 v H 230 (Eff 11-13-79); 138 v S 367 (Eff 3-23-81); 142 v H 5 (Eff 9-28-87); 143 v H 314 (Eff 5-31-90); 144 v H 321 (Eff 6-30-92); 146 v S 162 (Eff 10-29-95); 146 v S 2 (Eff 7-1-96); 146 v H 350 (Eff 1-27-97); 148 v H 264 (Eff 3-17-2000); 148 v H 471 (Eff 7-1-2000); 149 v S 108, § 2.01. Eff 7-6-2001.

00055

The provisions of § 8 of SB 108 (149 v -) read as follows:

SECTION 8. * * * Section 4112.02 of the Revised Code is presented in this act as a composite of the section as amended by both Am. H.B. 264 and H.B. 471 of the 123rd General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composites are the resulting version of the sections in effect prior to the effective date of the sections as presented in this act.

00056

APPENDIX 7

00057

§ 4112.14

Statutes & Session Law

TITLE [41] XLI LABOR AND INDUSTRY

CHAPTER 4112: CIVIL RIGHTS COMMISSION

4112.14 Age discrimination.

4112.14 Age discrimination.

(A) No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee.

(B) Any person aged forty or older who is discriminated against in any job opening or discharged without just cause by an employer in violation of division (A) of this section may institute a civil action against the employer in a court of competent jurisdiction. If the court finds that an employer has discriminated on the basis of age, the court shall order an appropriate remedy which shall include reimbursement to the applicant or employee for the costs, including reasonable attorney's fees, of the action, or to reinstate the employee in the employee's former position with compensation for lost wages and any lost fringe benefits from the date of the illegal discharge and to reimburse the employee for the costs, including reasonable attorney's fees, of the action. The remedies available under this section are coexistent with remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code; except that any person instituting a civil action under this section is, with respect to the practices complained of, thereby barred from instituting a civil action under division (N) of section 4112.02 of the Revised Code or from filing a charge with the Ohio civil rights commission under section 4112.05 of the Revised Code.

(C) The cause of action described in division (B) of this section and any remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code shall not be available in the case of discharges where the employee has available to the employee the opportunity to arbitrate the discharge or where a discharge has been arbitrated and has been found to be for just cause.

Effective Date: 07-06-2001

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00058

APPENDIX 8

00059

§ 4112.99

Statutes & Session Law

TITLE [41] XLI LABOR AND INDUSTRY

CHAPTER 4112: CIVIL RIGHTS COMMISSION

4112.99 Civil penalty.

4112.99 Civil penalty.

Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.

Effective Date: 07-06-2001

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00060

APPENDIX 9

00061



U.S. Code collection

[Prev](#) | [Next](#)

TITLE 15 > CHAPTER 1 > § 12

§ 12. Definitions; short title

How Current is This?

(a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-six, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

(b) This Act may be cited as the "Clayton Act".

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[Prev](#) | [Next](#)

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00062



U.S. Code collection

TITLE 15 > CHAPTER 1 > § 17

[Prev](#) | [Next](#)

§ 17. Antitrust laws not applicable to labor organizations

How Current is This?

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

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[Updates](#)
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[Your comments](#)

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00063

APPENDIX 10

00064



U.S. Code collection

TITLE 29 > CHAPTER 14 > § 621

[Prev](#) | [Next](#)

§ 621. Congressional statement of findings and purpose

How Current is This?

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

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[Parallel
regulations
\(CFR\)](#)
[Your
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[Prev](#) | [Next](#)

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00065

APPENDIX 11

00066



U.S. Code collection

TITLE 29 > CHAPTER 14 > § 623

[Prev](#) | [Next](#)

§ 623. Prohibition of age discrimination

How Current is This?

(a) Employer practices

It shall be unlawful for an employer—

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
- (3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

- (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;
- (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;
- (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

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[Notes](#)
[Updates](#)
[Parallel regulations \(CFR\)](#)
[Your comments](#)

00067

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631 (a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this

00068

chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631 (a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub. L. 101-239, title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

- (A) interrelation of operations,
- (B) common management,
- (C) centralized control of labor relations, and
- (D) common ownership or financial control,

of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account,

00069

because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056 (a)(3) of this title and section 401 (a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053 (a)(3)(B) of this title or section 411 (a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414 (q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of

00070

paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section..^[1]

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411 (b)(1)(H) of title 26 and subparagraphs (C) and (D) ^[2] of section 411 (b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411 (b)(1)(H) and 411 (b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002 (24)(B) of this title and section 411 (a)(8) (B) of title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414 (s) of title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 ^[2] if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)

(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

00071

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(A) an employee pension benefit plan (as defined in section 1002 (2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002 (35) of this title) provides for—

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)

(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A) (i) shall be reduced by the same percentage as the reduction in

00072

the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501 (c)(17) of title 26) that—

- (i)** constitutes additional benefits of up to 52 weeks;
- (ii)** has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and
- (iii)** is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

- (i)** the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);
- (ii)** the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or
- (iii)** the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)

- (i)** If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of \$3,000 per year for benefit years before age 65, and \$750 per year for benefit years beginning at age 65 and above.
- (ii)** If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of \$48,000 for individuals below age 65, and \$24,000 for individuals age 65 and above.
- (iii)** The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.
- (iv)** If an individual is required to pay a premium for

00073

retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(B) of this section, it shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because a plan of an institution of higher education (as defined in section 1001 of title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

[1] So in original.

[2] See References in Text note below.

APPENDIX 12

00075



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TITLE 29 > CHAPTER 28 > § 2601

§ 2601. Findings and purposes

How Current Is This?

(a) Findings

Congress finds that—

- (1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;
- (2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;
- (3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;
- (4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;
- (5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and
- (6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act—

- (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
- (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
- (3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
- (4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the

Search
this title:

Notes
Updates
Parallel
regulations
(CFR)
Your
comments

00076

Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

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00077

APPENDIX 13

00078



U.S. Code collection

TITLE 29 > CHAPTER 28 > SUBCHAPTER I > § 2611 § 2611. Definitions

[Prev](#) | [Next](#)

How Current is This?

As used in this subchapter:

(1) Commerce

The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 142 of this title.

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed—

- (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and
- (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include—

- (i) any Federal officer or employee covered under subchapter V of chapter 63 of title 5; or
- (ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

(3) Employ; employee; State

The terms "employ", "employee", and "State" have the same meanings

*Search
this title:*

Notes
Updates
Parallel
regulations
(CFR)
Your
comments

00079

given such terms in subsections (c), (e), and (g) of section 203 of this title.

(4) Employer

(A) In general

The term "employer"—

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes—

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203 (x) of this title; and

(iv) includes the Government Accountability Office and the Library of Congress.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) Employment benefits

The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 1002 (3) of this title.

(6) Health care provider

The term "health care provider" means—

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent

The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

00080

(8) Person

The term "person" has the same meaning given such term in section 203 (a) of this title.

(9) Reduced leave schedule

The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(10) Secretary

The term "Secretary" means the Secretary of Labor.

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or daughter

The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse

The term "spouse" means a husband or wife, as the case may be.

Prev | Next

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00081

APPENDIX 14

00082



U.S. Code collection

TITLE 42 > CHAPTER 21 > SUBCHAPTER VI > § 2000e § 2000e. Definitions

[Prev](#) | [Next](#)

How Current is This?

For the purposes of this subchapter—

(a) The term “person” includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include

(1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or

(2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501 (c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term “employment agency” means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term “labor organization” means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry

*Search
this title:*

Notes
Updates
Parallel
regulations
(CFR)
Your
comments

00083

affecting commerce if

- (1)** it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or
- (2)** the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is
 - (A)** twenty-five or more during the first year after March 24, 1972, or
 - (B)** fifteen or more thereafter, and such labor organization—
 - (1)** is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];
 - (2)** although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or
 - (3)** has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or
 - (4)** has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or
 - (5)** is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

00084

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2 (h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

Prev | Next

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00085



U.S. Code collection

TITLE 42 > CHAPTER 21 > SUBCHAPTER VI > § 2000e-2 § 2000e-2. Unlawful employment practices

[Prev](#) | [Next](#)

How Current is This?

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

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[Notes](#)
[Updates](#)
[Parallel regulations \(CFR\)](#)
[Your comments](#)

00086

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

(2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and

00087

employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

- (1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and
- (2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin

00088

employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)

(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)

(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802 (6)), other than the use or possession of a drug taken under the

00089

supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)

(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there

00090

has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28.

Prev | Next

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00091